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OUR FISHERY RIGHTS

IN THE

NORTH ATLANTIC.

By

JOS. I. DORAN.

"Our Fisheries"—Thos. Jefferson.

PHILADELPHIA:

ALLEN, LANE & SCOTT'S PRINTING HOUSE,

Nos. 229, 231, and 233 South Fifth Street.

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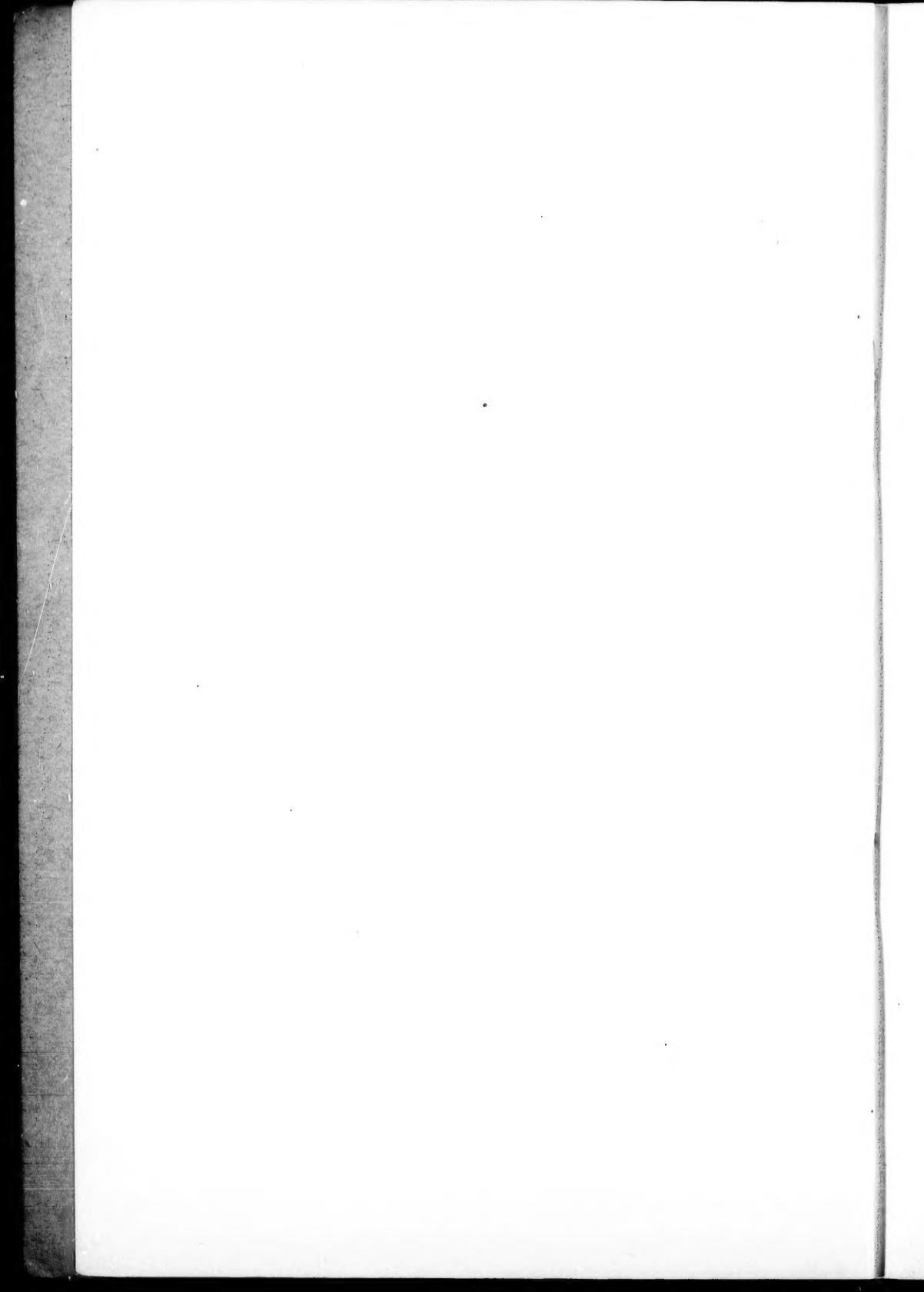
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PREFACE.

The "differences" with Canada about our fishery rights in the North Atlantic are still unsettled, and in order to determine what are proper terms for the settlement of the dispute it is necessary to examine the title under which we claim our rights, and the extent to which we have been enabled to enjoy them.

Notwithstanding the rejection of the Chamberlain-Bayard treaty by the Senate, the policy influencing the present Administration at Washington, in its negotiation, is still in control; and as Mr. Cleveland has, by his message to Congress of August 23d, 1888, officially declared "that the treaty just rejected by the Senate was well suited to the exigency, and that its provisions were adequate for our security in the future from vexatious incidents and for the promotion of friendly neighborhood and intimacy without sacrificing in the least our national pride or dignity," it is plain that he would approve another treaty containing similar provisions.

Mr. Chamberlain, speaking at Birmingham, March 28th, 1888 [see *London Times* of March 29th, 1888], said: "I observe that within the last day or two Mr. Bayard ["Hear, hear!"], a distinguished man who occupies at the present time the position of Secretary of State in America [cheers], has declared that in his judgment the treaty concedes to American fishermen all that in reason and justice they can ask from the Government of Canada. [Cheers.] But, if that be so, the refusal of such a settlement, the rejection of such an olive branch held out to the American people, would throw a heavy responsibility on the shoulders of those who would prolong the state of irritation and of dangerous antagonism which prevailed only two years ago in the relations between Great Britain and the United States. ["Hear, hear!"] I hope, as I have said, that nothing of the kind will occur; but in any case, even if the final result should be delayed, we have at

least succeeded in putting on record, in the most formal and authoritative way, the opinion of three governments, of the executives of three nations, as to what constitutes a just and honorable, a fair and reasonable, settlement of the differences that have arisen between them. That cannot be left out of account in the future ; *it must influence, and in the end it must govern, the final disposal of the question.* It is an element that I do not believe any fair or reasonable man, either in Canada or in the United States, would desire to ignore."

The policy of the present Administration on the question thus having been declared, and Mr. Chamberlain having announced that the rejected treaty "must influence and in the end must govern the final disposition of the question," any consideration of our fisheries rights now, or hereafter, will be incomplete without an examination of the provisions of the rejected treaty.

THE RIGHTS OF THE UNITED STATES IN THE NORTH ATLANTIC FISHERIES.

The rights of the United States in the North Atlantic Fisheries are in the nature of a joint ownership or tenancy in common with subjects of the British Crown, proprietary rights fully as great and the same as those of Canada itself, and they are rights existing in the United States without any corresponding right in British subjects on our coast.

By Article III. of the treaty of peace of 1783, by which England recognized the United States as "free, sovereign, and independent States," it was declared, as an incident of their separate sovereignty:—

"That the people of the United States shall continue to enjoy, unmolested, the right to take fish of every kind on the Grand Bank and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have the liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled it shall not be lawful for the said fishermen to dry or cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

"Continue to enjoy unmolested the right to take fish" and other explicit expressions in the treaty, the history of American rights in the fisheries, and of the negotiations of the treaty show that Article III. of the treaty of 1783 was a deliberate and express acknowledgment of existing rights, and not the grant of new ones.

In the debate on the treaty in the House of Lords the position taken by Lord Loughborough, that "the fishery on the shores retained by Britain is in the next article not ceded but recognized as a right inherent in the Americans, which, though no longer British subjects, they are to continue to enjoy unmolested—*no right, on the other hand, being reserved to British subjects to approach their shores for the purpose of fishing, in this reciprocal treaty,*" was not denied.

Cobbett's Parliamentary History, vol. 23, page 428.

Whatever rights Canadian fishermen enjoy in the fisheries of the North Atlantic were won by the men of New England from the French in colonial days. While colonies of Great Britain "the Americans had hitherto almost alone engaged in the fisheries on the coast of Nova Scotia and the Gulf of St. Lawrence. The New England men had planned and had alone furnished land forces for the first reduction of Cape Breton, and had assisted in the acquisition of Nova Scotia and Canada. The men of Massachusetts therefore claimed the fisheries on their coasts as a perpetual joint property."

Bancroft's History of the U. S., vol. 5, page 321;

Sabine's Report on the Fisheries, 185-196;

Winsor's Crit. & Nar. Hist. America, vol. 5, pages 147, 407.

On April 4th, 1748, a committee of the House of Parliament adopted the following resolution:—

"*Resolved*, That it is the opinion of this committee that the several provinces and colonies of Massachusetts Bay, New Hampshire, Connecticut, and Rhode Island be reimbursed the expenses they have been at in taking and securing to the Crown of Great Britain the island of Cape Breton and its dependencies."

Journal of the House, vol. xxv.

"These expenses," said Edmund Burke, in his speech on conciliation with America, "were immense for such colonies. They were above £200,000 sterling; money first raised and advanced on their public credit."

The colonists of New England, at the Declaration of Independence, were enjoying equal rights and a joint ownership

with British fishermen in the North Atlantic fisheries, and as the United States were successful in maintaining their independence they insisted, in the negotiations for peace, that these rights were not lost to them by the severance of their relations with the British Crown and should be expressly recognized in the treaty of peace.

These rights had been confirmed and defined by the charters of New England, and when the British Parliament passed the act of March, 1775, to prohibit the colonies of New England from fishing on the banks of Newfoundland, sixteen peers, among them Lord Camden and Lord Rockingham, protested against the passage of the act, "because the people of New England, besides the natural claim of mankind to the gifts of Providence *on their own coast*, are specially entitled to the fishery *by their charters*, which have never been declared forfeited."

American Archives, 4th series, 1774-1775, vol. 1, page 1690.

By the charter of Massachusetts Bay of 1691 the province of Maine and the territory of Acadia or Nova Scotia, with the lands (now New Brunswick) lying between Nova Scotia and Maine, were annexed to Massachusetts, and the northerly and easterly limits of the province of Massachusetts under that charter extended to the river St. Lawrence, and down the river St. Lawrence and along the Atlantic coast of Nova Scotia to the Gulf of St. Lawrence. Although in 1758 a separate constitution was granted to Nova Scotia the charter of Massachusetts Bay of 1691 continued in force, and Massachusetts and Maine remained under it and were entitled to the benefit of its provisions until the Revolution.

Charters of Massachusetts Bay of 1627 and 1691;
Charters and Constitutions of the U. S., part 1, pages 932-954;

John Adams to Wm. Tudor. Adams' Works, vol. x., page 354;

Haliburton's Historical and Statistical Account of Nova Scotia, vol. i., pages 73, 144, 210;

Winsor's Crit. & Nar. Hist. America, vol. 5, pages 91, 479-481.

By the charter of 1691 it was expressly provided that the subjects of the British Crown—

"That they and every of them shall have full and free power and *liberty to continue and use their said trade of fishing* upon the said coasts, in any of the seas thereunto adjoining, or any arms of the said seas or salt-water rivers *where they have been wont to fish*, and to build and set upon the lands within our said province or colony lying waste and not then possessed by particular proprietors, such wharves, stages, and workhouses as shall be necessary for the salting, drying, keeping, and packing of their fish, to be taken or gotten upon that coast, and to cut down and take such trees and other materials there growing, or being or growing upon any parts or places lying waste and not then in possession of particular proprietors, as shall be needful for that purpose, and for all other necessary easements, helps, and advantages concerning the trade of fishing there, in such manner and form *as they have been heretofore at any time accustomed to do*, without making any willful waste or spoil anything, in these presents contained to the contrary notwithstanding."

The phrases "continue to enjoy unmolested the right to take fish," and "used at any time heretofore to fish," in the Treaty of 1783, are only repetitions of the expressions "continue and use their said trade of fishing" "where they have been wont to fish," and "as they have been heretofore at any time accustomed to do," in the charters of 1629 and 1691; and word "liberty" is found in the charters of 1627 and 1691 as well as in the Treaty of 1793. The Treaty of 1783 was little more than a confirmation of the ancient and chartered rights recognized in the charters of 1627 and 1691.

Down to the Revolution Nova Scotia was hardly known except for its fisheries. In 1793 a witness before a committee of Commons spoke of the island of Newfoundland "as a great English ship moored near the banks during the fishing season for the convenience of English fishermen," and that "the governor was considered the ship's captain, and all those concerned in the fishing business as his crew."

Sabine's Report on the Fisheries, pages 237-230;
Winsor's Crit. & Nar. Hist. America, vol. 5, page 407.

The men and ships engaged in the fisheries were mainly from New England. In fact, the fisheries were almost, if not

entirely, conducted by the people of New England alone. In colonial days fish was the chief staple commodity of New England, as tobacco was in Virginia. The fishing towns were thriving and populous, and, so far as the people on this continent were concerned, the fisheries on the shores of Nova Scotia and Newfoundland, in the Gulf of St. Lawrence, and on the banks were to all intents and purposes the fisheries of New England. The shores immediately adjacent to the fisheries were sparsely peopled, and were used only in connection with the fisheries. Halifax itself was settled for the prosecution of the fisheries. Instead of the fisheries being an appurtenant to the neighboring coasts, the coasts, on the contrary, were entirely subservient to the fisheries, and were only used as an accommodation to their prosecution.

Sabine's Report on the Fisheries, pages 227, 237, 250, 261, 303, 390 ;

Haliburton's Nova Scotia, vol. i., pages 243, 261, 265.

Hon. Charles Levi Woodbury, in his "Headlands" pamphlet, in showing the distinct independence of the fisheries from the ownership of the soil of the coasts and the appurtenant subjection of the coast to the uses of the common fishery, says:—

"This charter of William and Mary remained in force until the American Revolution, though Nova Scotia had soon passed under French rule. The appurtenant character of the British colonial coasts to these fisheries came in question after the Revolution, and the Treaty of 1783 evidently is based upon and recognizes this principle, that the fishery was not an appurtenant of the shore of the colonies remaining to Great Britain. It was not the main object of the treaty to give fishery rights to one not entitled previously thereto, but was to relieve the shores by contract of as much of these old uses as the second party was willing to relinquish of his own right therein. Thus while the United States yields the right to dry and cure fish on the shores of Newfoundland, it retains the right to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador ; and where they are settled, to dry and cure with the consent of the inhabitants, proprietors of the grounds."

An express recognition of our fishery rights was one of the ultimatums of peace at the close of the Revolutionary War,

but England naturally opposed this claim and resisted it to the utmost.

"Against the British draft of the article on the fisheries, John Adams, with the steady and efficient support of Franklin and of Jay, spoke with the more effect as it introduced an arbitrary restriction; and he declared he would not set his hand to the treaty unless the limitations were stricken out. After long altercations the article was reduced to the form in which it appears in the treaty, granting to the United States equal rights with the British fishermen to take fish on the coast of Newfoundland and on the coasts, bays, and creeks of all other British dominions in America."

Bancroft's History of the U. S., vol. v, page 579.

"That third article was demanded as an ultimatum, and it was declared that no treaty of peace should ever be made without it, and when the British ministers found that peace could not be made without that article they consented, for Britain wanted peace, if possible, more than we did."

John Adams to William Thomas, Aug. 10th, 1822,
Adams' Works, vol. x, page 404.

The Continental Congress had by its resolution of May 27th, 1779, declared "that in no case by any Treaty of Peace the common right of fishing be given up."

The writer of an article in a late number of the *New York Tribune*, giving a history of the American fishery rights, makes the following concise and clear statement of the position taken by the United States in the negotiations for peace at the close of the Revolution:—

"In the negotiations for peace at the close of the Revolution, equal rights to the fisheries were imperatively demanded. The colonists were unwilling to make peace on any other terms. Mr. Livingston, Secretary of State, wrote to Dr. Franklin: 'If we were tenants in common with Great Britain while united with her, we still continue so, unless we have relinquished our title. Our rights are not invalidated by this separation, more particularly as we have kept up our claim from the commencement of the war, and assigned the attempt of Great Britain to exclude us from the fisheries as one of the causes of our recurring to arms.' The Continental Congress instructed John Adams by resolution 'that it is essential to the welfare of all the United States that the inhabitants thereof, at the expiration of the war, should continue to enjoy the free and undisturbed exercise of their common right to fish on the banks of Newfoundland and the other fishing banks and seas of North America, preserving in-

violate the treaties between France and the United States.' The original bases of peace proposed by Dr. Franklin were political independence, an adjustment of boundaries, and unrestricted rights to the fisheries; and these were adopted after a prolonged diplomatic struggle, notwithstanding hostile intrigues by France and Spain. John Adams was as inflexible in his refusal to conclude peace without obtaining explicit recognition of the fishing franchises, as Samuel Adams was intrepid and vehement in his declarations at Boston that war must be resumed if those rights were denied to New England. When the British Commissioners objected to the word 'right' in the fisheries clause, he indignantly exclaimed:—

"'Is there or can there be a clearer right? In former treaties, that of Utrecht and that of Paris, France and England have claimed the right and used the word. * * * If heaven at the creation gave a right, it is ours at least as much as yours. If occupation, use, and possession give a right, we have it as clearly as you. If war, and blood, and treasure give a right, ours is as good as yours. We have been continuously fighting in Canada, Cape Breton, and Nova Scotia for the defense of this fishery, and have expended beyond all proportion more than you. If, then, the right cannot be denied, why should it not be acknowledged and put out of dispute? Why should we leave room for illiterate fishermen to wrangle and chicanery?"

"Mr. Jay and Mr. Laurens, Associate American Commissioners, unequivocally supported Mr. Adams in his refusal to make peace unless the fisheries were included."

England finally yielded to our claim, and by the Treaty of Peace acknowledged our proprietary title or rights of ownership in the fisheries as well as our independence, and no corresponding rights were conferred upon or conceded to British subjects on the coasts of the United States.

Our title, therefore, under the Treaty of 1783 is one of joint ownership with the subjects of the British Crown, a title equal to and as good as theirs, appurtenant to our separate sovereignty declared and established by our War for Independence, and without any corresponding right on the part of British subjects on the coasts of the United States.

John Adams, in a letter to Richard Rush, dated April 5th, 1815 (Adams' Works, vol. x, page 160), said:—

"2. We have a right (I know not very well how to express it) but we have the right of British subjects. Not that we are now British subjects; not that we were British subjects at the treaty of 1783, but as having been British subjects, and entitled to all the rights, liberties, privileges, and immunities of British subjects, which we had possessed before

the Revolution, which we never had surrendered, forfeited, or relinquished, and which we never would relinquish any farther than in that treaty is expressed, our right was clear and indubitable to fish in all places in the sea where British subjects had fished or ever had a right to fish.

"3. We have a stronger and clearer right to all these fisheries in their largest extent than any Britons or Europeans ever had or could have, for they were all indebted to us and our ancestors for all these fisheries. We discovered them; we explored them; we settled the country, at our own expense, industry, and labor, without assistance from Britain or from Europe. We possessed, occupied, exercised, and practiced them from the beginning. We have done more towards exploring the best fishing grounds and stations, and all the harbors, bays, inlets, creeks, coasts, and shores where fish were to be found, and had discovered by experiments the best means and methods for preserving, curing, drying, and perfecting the commodity, and done more towards perfecting the commerce in it, than all the Britons and all the rest of Europe.

"4. We conquered Cape Breton and Nova Scotia, dispossessed the French, both hostile and neutral, and did more, in proportion, towards the conquest of Canada than any other portion of the British empire; and would and could have done the whole, at an easier expense to ourselves, both of men and money, if the British government would have permitted that union of colonies which we projected, planned, earnestly desired, and humbly petitioned. In short, we had done more, in proportion, towards protecting and defending all these fisheries against the French than any other part of the British empire. For all these reasons, if there is a people under heaven who could advance a claim or a color of a pretension to any exclusive privileges in the fisheries, or any rights in our part of the old British empire more than another, that people are the inhabitants of the United States of America, especially of New England. But we set up no claims but those asserted and acknowledged in the treaty of 1783. These we do assert, and these we will have and maintain."

See also Letter R. R. Livingston to Benj. Franklin, Jan. 7, 1782; Spark's Franklin, vol. 9, page 135.

In the treaty of peace made at Ghent between Great Britain and the United States, at the termination of the War of 1812, no reference is made to the fisheries. During the negotiation of that treaty Great Britain claimed that the fishing rights within the limits of British Sovereignty reserved to the United States in the Treaty of 1783 were annulled by the war; Commissioner Goulding, one of the British Commissioners, stating that although it was not intended to contest the right of the United States to the fisheries, "yet, so far as respected the

concessions to land and dry fish within the exclusive jurisdiction of the British, it was proposed not to renew that without an equivalent."

Memoirs J. Q. Adams, vol. 2, page 6.

The United States maintained, however, that our fishery rights and liberties stood on the same foundation as our right to independence and our territory; that the Treaty of 1783 conveyed no new rights, but acknowledged and confirmed existing rights and liberties enjoyed before the War of Independence; that the treaty was the partition of an empire, and a perpetual agreement—one of those fundamental agreements incorporated into the very existence of the United States therefrom; and that our fishery rights and liberties were no more affected by the War of 1812 than our right of independence; that unlike another class of treaties, the Treaty of 1783 was to be regarded as perpetual and of the nature of a deed in which the fisheries were an appurtenant of the soil conveyed, and that, therefore, no stipulation was necessary to secure the perpetuity of the appendage more than of the territory itself.

Wheaton, in his *International Law*, gives the following account of the claim of Great Britain and the position of the United States:—

"During the negotiation at Ghent, in 1814, the British plenipotentiaries gave notice that their government 'did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected with the British fisheries.' In answer to this declaration the American plenipotentiaries stated that they were 'not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto; from their nature, and from the peculiar character of the treaty of 1783, by which they were recognized, no further stipulation has been deemed necessary by the Government of the United States to entitle them to the full enjoyment of them all.'

"The treaty of peace concluded at Ghent, in 1814, therefore, contained no stipulation on the subject; and the British Government subsequently expressed its intention to exclude the American fishing vessels from the liberty of fishing within one marine league of the shores of the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of

the inhabitants, within those parts which had become settled since the peace of 1783.

"In discussing this question, the American minister in London, Mr. J. Q. Adams, stated, that from the time the settlement in North America, constituting the United States, was made, until their separation from Great Britain and their establishment as distinct sovereignties, these liberties of fishing, and of drying and curing fish, had been enjoyed by them, in common with the other subjects of the British empire. In point of principle they were pre-eminently entitled to the enjoyment; and, in point of fact, they had enjoyed more of them than any other portion of the empire; their settlement of the neighboring country having naturally led to the discovery and improvement of these fisheries; and their proximity to the places where they were prosecuted, having led them to the discovery of the most advantageous fishing grounds, and given them facilities in the pursuit of their occupation in those regions, which the remoter parts of the empire could not possess. It might be added, that they had contributed their full share, and more than their share, in securing the conquest from France of the provinces on the coasts of which these fisheries were situated.

"It was doubtless upon considerations such as these that an express stipulation was inserted in the treaty of 1783, recognizing the rights and liberties which had always been enjoyed by the people of the United States in these fisheries, and declaring that they should continue to enjoy the right of fishing on the Grand Bank, and other places of common jurisdiction, and have the liberty of fishing, and drying and curing their fish, within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed whilst they formed a part of the British nation. This stipulation was a part of that treaty by which His Majesty acknowledged the United States as free, sovereign, and independent States, and that he treated with them as such.

"It could not be necessary to prove that this treaty was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent State, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war. But the very words of the treaty attested that the sovereignty and independence of the United States were not considered as grants from His Majesty. They were taken and expressed as existing before the treaty was made, and as then only first formally recognized by Great Britain.

"*Precisely of the same nature were the rights and liberties in the fisheries.* They were, in no respect, grants from the King of Great Britain to the United States; but the acknowledgment of them as rights and liberties enjoyed before the separation of the two countries, and which it was mutually agreed should continue to be enjoyed under the new relations which were to subsist between them, constituted the essence of the article concerning the fisheries. The very peculiarity

of the stipulation was an evidence that it was not, on either side understood or intended as a grant from one sovereign State to another. Had it been so understood, neither could the United States have claimed, nor would Great Britain have granted, gratuitously, any such concession. There was nothing, either in the state of things, or in the disposition of the parties, which could have led to such a stipulation on the part of Great Britain, as on the ground of a grant without an equivalent.

"If the stipulation by the treaty of 1783 was one of the conditions by which His Majesty acknowledged the sovereignty and independence of the United States; if it was the mere recognition of rights and liberties previously existing and enjoyed, it was neither a privilege gratuitously granted, nor liable to be forfeited by the mere existence of a subsequent war. If it was not forfeited by the war, neither could it be impaired by the declaration of Great Britain at Ghent, that she did not intend to renew the grant. Where there had been no gratuitous concession, there could be none to renew; the rights and liberties of the United States could not be canceled by the declaration of the British intentions. Nothing could abrogate them but a renunciation by the United States themselves."

Lawrence's Wheaton's International Law, page 463;
See also Letters of John Adams, vol. x, Works of John
Adams, pages, 97, 131, 136, 159, 354, and 403;
Opinion C. A. Rodney to President Monroe, Nov. 3,
1818; Monroe MSS., Department of State; referred
to in Elliott's Northeastern Fisheries, page 45.

If the British pretension had been insisted on the war would have been continued, as James Monroe's instructions to the American commissioners were imperative that "the fishery rights of American citizens must not be discussed, and if the British demand their surrender all further negotiations must cease."

Finally the commissioners, without inserting any provision with regard to the fisheries, signed the formal treaty known as the treaty of Ghent. The first article of this treaty provided that "all territories, places, and possessions whatsoever taken by either party from the other during the war should be restored without delay." This in itself was an ample refutation of the British claim. The fisheries were a valuable "possession." If the British took them from us by the war, they were obliged by the letter of the treaty to restore them to us without delay.

The war, however, had shown Great Britain that her naval prestige was in danger, and that the chief source of that danger was in the fishing towns of New England. From that moment British statesmen directed their energies to the task of discouraging or destroying the fishing industry of that portion of the United States.

During the next year the British sloop-of-war "Jaseur" sailed along the northeastern fishing grounds, and notified all American fishing vessels to not come within sixty miles of the shore. The British Government, on being notified of this action, expressed disapproval of it, but so many other annoyances were heaped on our fishermen that Richard Rush and Albert Gallatin were sent to England to make a new and permanent convention, which it was hoped would be acceptable to England and enable our fishermen to pursue their occupation undisturbed.

They negotiated the Treaty of 1818, Article I. of which provides :—

"WHEREAS differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea Islands; on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shore of the Magdalen Islands; and also on the coasts, bays, harbors, and creeks, from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northward, indefinitely, along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same or any portion thereof shall be settled it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground; and the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the

above-mentioned limits : *Provided, however,* That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

By this treaty the joint ownership or tenancy in common of the United States was recognized and extended "forever," in return for certain restrictions of our rights. This was a genuine triumph of American diplomacy.

In a letter addressed to John Quincy Adams, Secretary of State, on October 20th, 1818, Messrs. Gallatin and Rush said :—

"The most difficult part of the negotiation related to the permanence of the right. To obtain the insertion in the body of the convention of a provision declaring that that right should not be abrogated by war was impracticable. All that could be done was to express the article in such manner as would not render the right liable to be thus abrogated. The words 'for ever' were inserted for that purpose. The insertion of the words 'for ever' was strenuously resisted. We declared that we would not agree to any article on the subject unless the words were preserved, or in case they should enter on the protocol a declaration impairing their effect. It will also be perceived that we insisted on the clause by which the United States renounce their right to the fisheries relinquished by the convention, that clause having been omitted in the first British counter-project. We insisted on it with the view, first, of preventing any implication that the fisheries secured to us were a new grant, and of placing the permanence of the rights secured and of those renounced precisely on the same footing ; second, of its being expressly stated that our renunciation extended only to the distance of three miles from the coasts. This last point was the more important, as with the exception of the fishing in open boats in certain harbors, it appeared that the fishing ground on the whole coast of Nova Scotia is more than three miles from the shores. It is in that point of view that the privilege of entering the ports for shelter is useful, and it is hoped that with that provision a considerable portion of the actual fisheries on that coast (of Nova Scotia) will, notwithstanding the renunciation, be preserved."

John Quincy Adams, Secretary of State during this period, referring to the Treaty, said :—

"We have gained by the convention of 1818 an adjustment of the contest of our whole principle. The convention restricts the liberties in some small degree, but it enlarges them probably in a degree not less

useful. It has secured the whole coast fishery of every part of the British dominions, except within three marine miles of the shores, with the liberty of using all the harbors for shelter, for repairing damages, and for obtaining wood and water. It has secured the whole participation in the Labrador fisheries, the most important part of the whole, and of which it was at Ghent peculiarly the intention of the British Government at all events to deprive us. The convention has also secured to us the right of drying and curing the fish on a part of the island of Newfoundland, which had not been enjoyed under the treaty of 1783; it has narrowed down the pretensions of exclusive territorial jurisdiction with reference to those fisheries to three marine miles from the shores. Upon the whole I consider this interest as secured by the convention of 1818 in a manner as advantageous as it had been by the treaty of 1783."

Adams and Russell, page 241.

Hon. Charles Levi Woodbury, in an open letter on the fisheries dispute, published in the American Law Review of May-June, 1887, page 442, speaking of these rights, says:—

"The rights, elaborately defined by treaty, which we possess along the coasts and in the bays, harbors, and ports of British North America, belong as fully to the United States as does the Capitol or the White House at Washington. They are the trophies of the centuries of privation, toil, and bloodshed through which our colonial ancestors secured themselves from foreign influences.

"There is not a foot of British North America, from Lake Superior to the Atlantic, to the winning of which from France our American ancestors did not bear their share in arms. The memories of Lake George, Frontenac, Detroit, Quebec, and Louisbourg are our heirlooms as well as England's. Great Britain's fishing rights, in or adjacent to what is now British North America, were never exclusive. Whatever pertained to the great common of fisheries, whatever enured from the conquest of Canada, equally pertained and enured to us as to her. The treaty of 1783 regulated mutual, joint, and several uses in a part of these old common or acquired fishery rights, and that of 1818 was a partial re-arrangement thereof. In said treaties, no pretension can be found that Great Britain then or ever before had any exclusive ownership over the fisheries of the Northeast."

It is to be noticed that the Treaty of 1783 uses the words "right" and "liberty" apparently as of different meaning. "Right" is used in one clause, "liberty" in the other. John Adams explains how the word liberty got into the Treaty of 1783: "The word *right* was in the article as agreed to by the British ministers, but they afterwards requested that the word *liberty* might be substituted instead of right. They said it

amounted to the same thing, for liberty was right, and privilege was right; but the word *right* might be more unpleasing to the people of England than liberty; and we did not think it necessary to contend for a word."

John Adams to Wm. Thomas, August 10th, 1822,
Adams' Works, vol. x., page 403.

The charters of Massachusetts Bay of 1627 and 1691 had used "liberty" to secure the right to fish, and there "liberty" had, so far as language could, effectually and permanently secured the right to fish, as if the word "right" had been used. The letter of John Adams shows why and with what understanding "liberty" was used in the Treaty of 1783, and therefore no distinction can be drawn as to the meaning of "right" and "liberty" in the Treaty of 1783.

The British contention as to the abrogation of our fishing privileges by the War of 1812 was limited during the negotiation of the Treaty of 1818 to our "fishing liberty," and did not extend to our "fishing rights." This accounts for no reference to our "fishing rights" in the Treaty of 1818.

Lord Bathurst, in his letter of October 30th, 1815, to John Quincy Adams, admitted the force of the argument that the Treaty of 1783 was the partition of an empire, but endeavored to draw a distinction between "*rights*" and "*liberties*," admitting that our fishing "*rights*" were not abrogated by the War of 1812, and claimed that the "*liberty to fish*" was different from the "right to fish," and was annulled by the War of 1812.

"If these liberties," he says, "thus granted were to be perpetual and indefeasible as the rights previously recognized, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language; and above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character as inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether. It is surely obvious that the word '*right*' is throughout the Treaty used as applicable to what the United States were to enjoy by virtue of a recognized independence, and the word '*liberty*' to what they were to enjoy as concessions strictly dependent on the treaty itself."

See Annals of Congress, 15th Cong., 2d Sess., p. 1463.

The claim seriously presented by the British Commissioners during the negotiation of the Treaty of Ghent had not in fact gone any further.

Memoirs J. Q. Adams, vol. 2, page 6.

John Quincy Adams, in his reply to Lord Bathurst, completely answered the position taken by the British Government and established that the *liberty* to fish, "far from including in itself either limitation of time or precariousness of tenure, is essentially as permanent as that of *right*." He said:—

"That, previous to the independence of the United States, their people, as British subjects, had enjoyed all the *rights* and *liberties* in the fisheries which form the subject of the present discussion; and that, when the separation of the two parts of the nation was consummated by a mutual compact, the treaty of peace defined the *rights* and *liberties* which, by the stipulation of both parties, the United States in their new character were to enjoy. By the acknowledgment of the independence of the United States, Great Britain bound herself to treat them, thenceforward, as a nation possessed of all the prerogatives and attributes of sovereign power. The people of the United States were, thenceforward, neither bound to allegiance to the sovereign of Great Britain, nor entitled to his protection in the enjoyment of any of their rights as his subjects. Their rights and their duties as members of a State were defined and regulated by their own constitutions and forms of government. But there were certain *rights* and *liberties* which had been enjoyed by both parts of the nation while subjects of the same sovereign, which it was mutually agreed they should continue to enjoy unmolested; and, among them, were the *rights* and *liberties* in those fisheries. The fisheries on the banks of Newfoundland, as well in the open seas as in the neighboring bays, gulfs, and along the coasts of Nova Scotia and Labrador were, by the dispensations and the laws of nature, in substance, only different parts of one fishery. Those of the open sea were enjoyed not as a common and universal right of all nations; since the exclusion from them of France and Spain, in whole or in part, had been expressly stipulated by those nations, and no other nation had, in fact, participated in them. It was, with some exceptions, an exclusive possession of the British nation; and in the treaty of separation it was agreed that the *rights* and *liberties* in them should continue to be enjoyed by that part of the nation which constituted the United States; that it should not be a several, but as, between Great Britain and the United States, a common fishery. It was necessary for the enjoyment of this fishery, to exercise it in conformity to the habits of the species of game of which it consisted. The places frequented by the fish were those to which the fishermen were obliged to resort, and these occasionally brought them to the borders of the British territorial jurisdiction. It was also neces-

sary, for the prosecution of a part of this fishery, that the fish, when caught, should be immediately cured and dried, which could only be done on the rocks or shores adjoining the places where they were caught ; the access to these rocks and shores, for those purposes, was secured to the people of the United States, as incidental and necessary to the enjoyment of the fishery ; it was little more than an access to naked rocks and desolate sands ; but it was as permanently secured as the right to the fishery itself. No limitation was assigned of time. Provision was made for the proprietary rights which might at a distant and future period arise by the settlement of places then uninhabited ; but no other limitation was expressed or indicated by the terms of the treaty, and no other can, either from the letter or spirit of the article be inferred.

"It was precisely because they might have lost their portion of this joint national property, to the acquisition of which they had contributed more than their share, unless a formal article of the treaty should secure it to them, that the article was introduced. By the British municipal laws, which were the laws of both nations, the property of a fishery is not necessarily in the proprietor of the soil where it is situated. The soil may belong to one individual, and the fishery to another. The right to the soil may be exclusive, while the fishery may be free, or held in common. And thus, while in the partition of the national possessions in North America, stipulated by the treaty of 1783, the jurisdiction over the shores washed by the waters where this fishery was placed was reserved to Great Britain, *the fisheries themselves, and the accommodations essential to their prosecution, were, by mutual compact, agreed to be continued in common.*"

Annals of Congress, 15th Cong., 2d Sess., p. 1466.

As our "rights" under the Treaty of 1783 were not questioned, no reference whatever was therefore made to them in the Treaty of 1818, and the Treaty of 1818 was intended to operate upon the "liberty" to take fish alone. We are consequently left in possession, unaffected by the Treaty of 1818, of all "rights" we had under the Treaty of 1783 to fish on the Grand Bank, on all the other banks of Newfoundland, also in the Gulf of St. Lawrence, and elsewhere in the sea where we used any time previously to fish.

"Sir, this treaty operates upon the liberty alone," said the Hon. Zeno Scudder, referring to the Treaty of 1818, in the House of Representatives, August 12th, 1852, "which Lord Bathurst contended had been affected by the war ; but not one word is said or contained in it relative to the right of fishery, which Lord Bathurst admitted was not affected by the war. Now, sir, let me ask this committee and the country to refer to the Treaty of 1783, and see in what part of these fisheries we had a

right instead of a *liberty*. Sir, among other places we had and have still a title of right in the whole of the Gulf of St. Lawrence. Let the British ministry or any other power on earth construe the Treaty of 1818 as they will, respecting the liberty on the bay, creek, and harbor, still it cannot affect the title of right in the Gulf of St. Lawrence, which has never been modified or altered since the Treaty of 1783, and the subsequent expression of Lord Bathurst, that it could not be modified or altered. I will leave it to the fishermen of the country to define the extent of the Gulf of St. Lawrence to contain, besides the Magdalen Islands and Prince Edward Island, many other important coasts, shores, &c., which are resorted to for our fishing purposes."

Cong. Globe, 32d Cong., 1st Sess., vol. 25, p. 927.

It is therefore important to bear in mind that at the negotiation of the Treaty of 1818 Great Britain expressly acknowledged our fishing "rights" were not abrogated by the War of 1812, that our rights recognized and secured under the Treaty of 1783 were not affected or intended to be affected by the Treaty of 1818, the United States never admitted that the "liberty to fish" was lost by the War of 1812, and that by acceptance from us of a renunciation of a portion of the "liberty" to take fish the British Government implicitly acknowledged that our fishing liberties under the Treaty of 1783 were not abrogated by the War of 1812.

John Adams, speaking of the Treaty of 1818, said:—

"The United States have renounced forever that part of the fishing liberties which they had enjoyed, or claimed, in certain parts of the exclusive jurisdiction of the British Provinces and within three marine miles of the shores. The first article of this convention affords a signal testimonial of the correctness of the principle assumed by the American plenipotentiaries at Ghent for as by accepting *the express renunciation by the United States of a small portion of the privilege in question, and by confirming and enlarging all the remainder of the privilege forever, the British Government have implicitly acknowledged that the liberties of the third article of the Treaty of 1783 have not been abrogated by the war.*"

The treaty of 1818 worked well for about twenty years, until disturbing elements arose. A new generation of Canadians had grown up, knowing or caring nothing for the treaty of 1783, or of our proprietary rights or joint ownership in the fisheries. The mackerel fishery in the Gulf of St. Lawrence had been discovered to be of great value. The various non-intercourse acts had been repealed, and the markets of

the United States were open under certain restrictions to Canadian enterprise. If those restrictions could be entirely removed Canada would be immediately and immeasurably benefited, and it was thought that the quickest and surest way to obtain this result would be to harass American fishermen until they cried out for relief.

To furnish the pretext the pretension was revived that the entire fishing rights and liberties of the United States under the Treaty of 1783 were annulled by the war of 1812, and the announcement was made that American fishermen had no rights except those which were granted them by the Treaty of 1818, and that the terms of that treaty would be literally executed until such concessions were made as Canada desired. Everything possible to harass and annoy our fishermen was the policy adopted and persistently pursued. The spirit in which Canada has always dealt with our treaty rights is well illustrated by what was lately said by Mr. Davies, of Prince Edward's Island, a member of the Canadian Parliament, with reference to the recent course of Canada: "They were not satisfied with putting a construction upon the treaty, and then carrying out that construction in a firm and reasonable way, but were determined that the custom laws of this country should be dragged in to harass, to irritate and worry, and drive to desperation the American fishermen, as it did drive them to desperation." This programme, though carried out with varying severity, and after long periods of intermission, resulted in the reciprocity treaty of 1854. This triumph of British diplomacy admitted into the United States free of duty everything which Canada had to sell, and admitted into Canada free of duty only the articles which she produced herself. It came to an end, by notice from the United States, in 1866.

The next agreement—the treaty of Washington—was negotiated in 1871; but the fisheries clauses of this treaty were also annulled by notice from the United States, and expired on July 1st, 1885, leaving the twenty-ninth or transportation clause in force.

The rights, therefore, of the United States in the North Atlantic fisheries at this date are to be measured by the pro-

visions of the treaties of 1783 and of 1818, and by the additional privileges derived under the concurrent action in 1830 of Great Britain and the United States in annulling their respective non-intercourse laws as to the British colonies in North America, and under the twenty-ninth clause of the Treaty of 1871. They are not fishery privileges of one nation in the jurisdictional waters of another, but are rights in the nature of a joint ownership, rights common with the Canadians and fully as great and the same as those of Canada itself. They were vested in the United States on the same foundation and at the same time as our independence and our territorial sovereignty, and they are rights existing in the United States without any corresponding or reciprocal rights in British subjects on our coast.

The fisheries are not "Canadian." They are "our fisheries" (to use the expression of Thomas Jefferson) as much as those of Canada, and should be designated as the North Atlantic or Northeastern or the American Fisheries, and not by the term "Canadian" or any word that would imply an exclusive ownership or sovereignty of Canada with regard to them.

In addition to the proprietary rights possessed by the United States in the North Atlantic fisheries, the fishing vessels of the United States, under the concurrent action of the two countries in 1830 and under the twenty-ninth clause of the treaty of 1871, are entitled to unrestricted commercial and transportation privileges to the same extent and in the same manner as those engaged in any other business.

When the treaties of 1783 and 1818 were signed, foreign nations were prohibited from intercourse by sea with the colonies of Great Britain, and the rights acknowledged to be in the United States under these treaties being distinctively fishery rights, and not commercial rights, conferred no right in the United States to trade with British North America.

"The policy first expressed by the act of 12 Car., II. had been to prohibit foreign nations from intercourse by sea with her colonies, either to

import into or export from them in their vessels. This policy was in force when the treaty of 1783 was made. The rights of the United States, therein acknowledged, to use the ports, creeks, and shores for the purpose of its fishery conferred no right to trade with British North America. In 1818 the laws of the United States also prohibited British vessels from importing from or exporting to the colonies from the ports of the United States, and continued so to prohibit them long after the treaty of 1818."

Letter of Chas. Levi Woodbury to Senator Morgan,
American Law Rev., vol. xxi, p. 432.

In a decision under the treaty in the vice-admiralty court in 1806 (the "Fame," Stewart's Rep., 95), it was said that although American vessels could supply their own fishing vessels with necessaries and enter an uninhabited port in the course of such trading, the Treaty of 1783 gave no authority to trade with the shore, so that the words "for no other purpose whatever" in the Treaty of 1818 were merely declaratory of the then existing relations between the two countries so far as the three-mile limit was concerned, a prohibition of all commercial and other privileges beyond those expressed.

By the concurrent action of Great Britain and the United States in 1830 the prohibition of commercial intercourse between the United States and the colonies of Great Britain was annulled.

"In 1825, after several efforts, the legislatures of the two governments began to open trade, and the act of Charles II. was subsequently repealed. In 1830 the United States and Great Britain dropped their respective non-intercourse laws as to British North America, and opened their ports to each other, upon being satisfied that neither imposed on the other's vessels 'any restrictions or discriminations.'

"His Majesty declares,' says Mr. Secretary Buller, November 6th, 1830, 'that the ships of and belonging to the United States of America may import from the United States aforesaid into the British possessions abroad goods the produce of those States, and may export goods from the British possessions abroad to be carried to any foreign country whatever.'

"General Jackson's proclamation, October 5th, 1830, says: 'British vessels and their cargoes are admitted to an entry in the ports of the United States from the islands, provinces, and colonies of Great Britain on or near the American continent and north or east of the United States.'

"Thus was the right of the vessels of each to the privileges of foreign commerce in the ports of the other established without any class restrictions. Buying and selling bait, like the importation or exportation of it,

are commercial transactions, and therefore, by the pledged faith of the proclamation of 1830 open to commerce by the vessels of each country."

Letter Chas. Levi Woodbury, *Am. Law Rev.*, vol. xxi, page 431.

See also *Niles Register*, vol. 7, appendix, page 191; appendix, page 66.

By this action of the two countries commercial privileges were thus extended in 1830 to fishing and all other vessels of the United States, and to this extent the language, "for no other purpose whatever," in the Treaty of 1818, declaratory of the then existing general prohibition of all commercial privileges between the two countries, was modified.

The twenty-ninth article of the Treaty of Washington, of 1871, is as follows:—

ARTICLE XXIX.

"It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may from time to time be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.

"It is further agreed that, for the like period, goods, wares, or merchandise arriving at any of the ports of Her Britannic Majesty's possessions in North America and destined for the United States, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations and conditions for the protection of the revenue as the Governments of the said possessions may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without payment of duties, from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions."

Article XXIX., treaty of Washington, 1871, Wheaton's *International Law*, second edition, 700.

Thus, by the action of the two countries in 1830, and by the twenty-ninth section of the Treaty of 1871, have the proprietary and ancient rights and liberties of this country in the North Atlantic fisheries been supplemented by commercial and transportation privileges. The existence of these privileges is emphasized by the fact that when during the negotiation of the Treaty of 1818 a proposition was made by the British Commissioners to insert a stipulation that "it shall not be lawful for the vessels of the United States engaged in the said fishery to have on board any goods, wares, or merchandise whatever, except such as may be necessary for the prosecution of the fishery or support of fishermen," it was objected to by the American Commissioners on the ground that it "would expose our fishermen to endless vexations," and it was withdrawn.

These commercial and transportation privileges have been and are at this time freely and fully exercised by the Canadians. Their fishing and other vessels enter and use our ports, enjoying without restriction and to the fullest extent every privilege claimed by the fishing vessels of the United States under the concurrent action of the two countries in 1830, and the twenty-ninth clause of the Treaty of Washington.

The "headland" doctrine of the Canadians, and the construction attempted to be put upon our proprietary rights whereby the American fishermen are denied the right to enter bays and harbors to purchase coal for fuel, and bait, and to transship their catch, are "new doctrines," and have been set up not only in defiance of the plain intent of the treaties and legislation under which our rights are recognized, and the rulings upon them, but as after-thoughts, and contrary to the views of the British Government.

Considering the origin and nature of the rights of the United States in the North Atlantic fisheries, the relative situation of the two countries and the close commercial relations

existing between them, and construing the Treaty of 1818 as one of "friendship and not of hostility," and according to the customary rules applicable to instruments of this character, the rights of the United States and of its fishing vessels in the North Atlantic fisheries and their privileges in Canadian ports would seem to be clear under the treaty stipulations and the concurrent legislation of the two countries.

The liberty of American vessels to fish within three miles of certain parts of the shore was practically the only privilege which under the Treaty of 1818 was renounced by the United States, and, with this restriction only, the fishery rights of the United States are the same as those of Canada itself.

The buying of bait and supplies by fishing or any other vessels of the United States in Canadian ports is a commercial privilege to which they are entitled under the action of the two countries in 1830; and the right of American fishing vessels to transship their catch from Canadian ports to points in the United States is secured to them by the twenty-ninth clause of the Treaty of 1871.

Canada, however, now insists that the fishing vessels of the United States have no right to enter any bays of Canada, no matter how wide, and have no right to buy bait and supplies or transship their catch from Canadian ports to points in the United States; and has endeavored so to harass and annoy our fishing vessels in the exercise of rights which it admits them to possess as to make these rights, for the present, worthless. The position assumed is that the fishery rights of the United States are nothing more than the ordinary rights of fishing which are permitted to citizens of another sovereignty by a country having the exclusive territorial jurisdiction over them, and the proprietary rights of the United States in them are ignored.

Wheaton, in describing the right of fishing of one nation in the jurisdictional waters of another, says:—

"The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State. The exercise of this right between France and Great Britain was regulated by a conven-

tion concluded between these two powers, in 1839; by the ninth article of which it is provided, that French subjects shall enjoy the exclusive right of fishing along the whole extent of the coasts of France, within the distance of three geographical miles from the shore at low-water mark, and that British subjects shall enjoy the same exclusive right along the whole extent of the coasts of the British Islands, within the same distance; it being understood, that upon that part of the coasts of France lying between Cape Carteret and the point of Monga, the exclusive right of French subjects shall only extend to the fishery within the limits mentioned in the first article of the convention; it being also understood, that the distance of three miles, limiting the exclusive right of fishing upon the coasts of the two countries, shall be measured, in respect to bays of which the opening shall not exceed ten miles, by a straight line drawn from one cape to the other."

Section 180, Wheaton's International Law. (Boyd's ed.), page 241.

A privilege of this kind is very different in its character from the proprietary rights possessed by the United States in the North Atlantic fisheries.

Consequent upon the three-mile limit from the shore, provided under the treaty of 1818, the United States has never since claimed the right to fish within bays whose headlands were less than six miles apart. But Canada asserts that the fishing vessels of the United States have no right to fish in any of its bays, no matter how wide between the headlands, a claim which was not set up until some twenty years after the treaty of 1818 had been concluded.

The position now assumed by Canada took no definite shape until some time after the year 1841, when the opinion of the law officers of the Crown in England was given on certain questions submitted by the Nova Scotia Government, which set forth and were based on the fundamental error that the United States had obtained the "right to take fish on the Grand Banks," &c., at the peace and under the Treaty of 1783. This error in the questions submitted was only equaled by the

recklessness of the opinion that held unqualifiedly "that the Treaty of 1783 was annulled by the War of 1812," and that "no right exists on the part of American citizens to enter the bays of Nova Scotia there to take fish, although the fishing being within the bay may be at a greater distance than three miles from the shore of the bay, as we are of the opinion that *the term headland is used in the treaty* to express that part of the land we have before mentioned, excluding the interior of bays."

Sabine's Report on the Fisheries, pages 405, 472;

Speech of Hon. Lewis Cass, U. S. Senate, Aug. 3, 1852,
Appendix Cong. Globe, vol. 25, page 896.

As has already been shown, the British Government had not, in the negotiations of the Treaty of 1818, claimed that the Treaty of 1783 was entirely abrogated by the War of 1812. By the language of the Treaty of 1818 they were and are estopped from asserting that the fishery liberties reserved by the Treaty of 1783 were annulled. The argument of the American Commissioners, in the negotiations of the Treaty of Ghent and the Treaty of 1818, was conclusive that the War of 1812 had not deprived us of our fishery rights and liberties under the Treaty of 1783. The rule, as stated by writers on international law, was and is substantially that treaties stipulating for a permanent arrangement of territorial and other national rights are not annulled by war.

Wharton's International Dig., ii., chapter vi., section 135.

The Supreme Court of the United States (8 Wheaton, 464, 1823), held that—

"Where treaties contemplate a permanent arrangement of territorial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law even the Treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted and would be so monstrous as to supersede all reasoning."

In the case of *Sutton vs. Sutton*, 1 Rus. & M., 675, 1830, it was held by Sir J. Leach, Master of the Rolls, that territorial rights given under the Treaty of 1794 between Great Britain and the United States, were permanent in their character, and were not abrogated by the War of 1812. This case; the debate in Parliament relating to the Treaty of Amiens, in 1802 (*Hansard's Deb.*, vol. xxiii., page 1147); and the opinions of Sir James Marriot, in 1765, and of Attorney-General Ryder and Solicitor-General Murray, in 1753, to the effect that the fishery clause in the Treaty of November 16th, 1686, between England and France, was not annulled by war (*Opinions of Eminent Lawyers, &c.*, Geo. Chalmers, vol. ii., pages 344, 355, 1814), must be presumed to have been known to the law officers of Crown in 1841.

The disregard of these precedents and the statement in the opinion that "the term headland is used in the treaty," when that word is not found anywhere in it, do not render the opinion creditable to the accuracy or professional reputation of the gentlemen who gave it.

The Hon. Hannibal Hamlin, in 1852, referring to the Treaty of 1818, and the new doctrine set up by Canada under the opinion referred to, said:—

"The only thing claimed through all the negotiations was that we should be excluded from coming within three miles of the shore, not bays that were leagues in extent. Had such been the intention of any party to the treaty, we should find somewhere such a claim. None such was made. Had there been, it would have been promptly denied. That clause which says, 'that the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors, &c.,' is to exclude us from the great bays and gulfs. Was such the intention of Great Britain? She never made any such pretensions during all the negotiations, and when we renounced our right to the shore fisheries, as we did in the treaty, and of taking fish within three marine miles of the coasts, bays, creeks, and harbors, that language became necessary to exclude us from the small bays, creeks, and harbors within three miles of the shore—within the jurisdiction of Great Britain, and which we had formerly enjoyed—claimed as a right. That such was the intention of the parties must be inferred from the facts to which I have alluded, which took place during the negotiations.

"But the last clause of the article contained in the proviso at the end, will explain what *bays, creeks, and harbors* were surrendered up by our Government. The article says:—

"'American fishermen shall be admitted to enter such *bays* and harbors for the purpose of *shelter*, and for *repairing damages therein*, purchasing wood, and obtaining water.'

"The *bays* and *harbors* which are surrendered up by the Americans are *the* bays and harbors into which the American fishermen may go to find a *shelter*, *repair damages*, purchase *wood*, and obtain water. All these things could only be done in the small harbors, which would afford shelter, and where damage could be repaired. But to allow fishermen to go into the Gulf of St. Lawrence or the Bay of Fundy for repair or shelter! They might with far greater propriety seek the open sea for shelter, for with sufficient sea-room they might be safe, while in such bays as the Bay of Fundy they would be sure of destruction upon a lee shore. Better, far better, to seek the broad and trackless ocean for a *shelter*, to repair for wood or water. The very uses to which these bays and harbors are to be appropriated must show what was intended—such harbors and bays as could be used for the purposes named. The same interpretation of the word bay in the treaty, when applied to Fundy, Chaleur, or St. Lawrence, should be understood as when applied to the Bay of Biscay or the Gulf of Mexico.

"Another view of this question will, it is believed, furnish us with what is the true construction of the treaty, by which we are restricted in certain bays, creeks, and harbors therein named. What were the rights enjoyed by our fishermen under the Treaty of 1783? They had the right and did use what is known as the shore fisheries inside of three miles from the shore, and in the bays, creeks, and harbors, with which the whole coast was indented. These were what we occupied, and for many purposes they were very valuable. To them were claimed a right, and these were the privileges which we renounced. A line drawn from indentation to indentation along the coast, as has always been contended for by our Government, would exclude us from the shore fisheries, which were and are so called in distinction from the sea fisheries more than three miles from the shore.

"Besides, the intention of our ministers who negotiated the treaty, and the evidence which the protocols furnish as the negotiations progressed, all concur to aid us in our construction. These protocols and this evidence of that time are of great importance, and cannot fail to carry conviction along with them as to what was intended by the language used in the treaty and the reasons for which it was placed there."

Appendix to the Congressional Globe, vol. 25, page 900.
August, 1852, Thirty-second Congress, First Session.

In his letter of July 18th, 1853, to Secretary of State Marcy, Richard Rush, who was one of the commissioners on

the part of the United States in making the treaty of 1818, thus refers to the pretensions of Canada :—

"In signing it, we believed that we retained the right of fishing in the sea, whether called a bay, gulf, or by whatever other term designated, that washed any part of the coast of the British North American provinces, with the simple exception that we did not come within a marine league of the shore. We had this right by the law of nations.

"Its confirmation was in the Treaty of 1783. We retained it undiminished, unless we gave it up by the first article of the convention of 1818. This we did not do. The article warrants no such construction. Mr. Everett, when minister in London, writing to Lord Aberdeen, August 10th, 1843, under instructions from the Secretary of State, remarks that 'the right of fishing on any part of the coast of Nova Scotia (consequently in the Bay of Fundy) at a greater distance than three miles is so plain that it would be difficult to conceive on what ground it could be drawn in question had not attempts been made by the provincial authorities of Her Majesty's Government to interfere with its exercise;' and Mr. Stevenson, minister in London before Mr. Everett, while writing to Lord Palmerston, March 27th, 1841, in reference to our right to fish in the large outer bays, says 'the stipulations of the Treaty (convention) of 1818 are believed to be too plain and explicit to leave room for doubt or misapprehension.'

"As to the Bay of Fundy, part of its coast belongs to one of the States of the Union, namely, Maine. Hence Britain cannot claim it as her exclusive dominion. Had Mr. Gallatin been told by the British plenipotentiaries that the first article of the convention would close the extensive waters of that bay against our fishermen, I do not believe he would have signed it. I am sure I would not have signed it. The spirit, context, all the concomitants of the article, pointed to a different meaning. I need not cite all its words. You are familiar with them. It will be enough to bring into view the proviso which follows the clause of renunciation. That part runs thus :—

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above-mentioned limits (those set out for us in the beginning of the article) : *Provided, however,* That the American fishermen shall be permitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever."

"These are the decisive words in our favor. They meant no more than that our fishermen, whilst fishing in the waters of the Bay of Fundy, should not go nearer than three miles to any of those smaller inner bays, creeks, or harbors which are known to indent the coast of Nova Scotia and New Brunswick.

"To suppose they were bound to keep three miles off from a line drawn from headland to headland on the extreme outside limits of that bay, a line which might measure fifty miles or more, according to the manner of drawing or imagining it, would be a most unnatural supposition. I cannot think that it entered the minds of the British plenipotentiaries any more than ours. For would it not be useless to tell fishermen, when half wrecked, that they might cross such a line for the purpose of seeking shelter in bays, creeks, and harbors, lying at an immense distance inside of it? Tempest-tossed outside of a great sea-line like that, damaged in sails and rigging, how were they to reach the sheltering havens they desired? To suppose it is a mockery; and similar reasoning applies to all the other large bays and gulfs.

"We inserted the clause of renunciation. The British plenipotentiaries did not desire it. Without it room might have been left for the inference that what we got under the convention was a grant from Britain; whereas, our ground of argument being that, with the exception of shore privilege, our fishing rights remained as under the Treaty of 1783, we could receive nothing which had been agreed upon by the first article in the light of a concession or favor from her. We took it only as part of a coequal agreement and in the sense of a compromise.

"In conformity with our construction was the practice of Britain herself after the convention was ratified. Our fishermen were waiting for the word not of exclusion, but admission, to those large outer bays. They had been shut out from them, some captured, and all warned away after the Treaty of Ghent. The interval was an anxious one to them. Accordingly, as soon as the convention went into operation, they eagerly hastened to their ancient resorts, reinstated by the provident care of their Government. Hence the significant motto of our Revolutionary patriot and sage, that we would both fish and hunt over the same grounds as heretofore. No complaint was made or whispered by any member of the British Government of that day of which I ever heard.

"I remained minister at the court nearly seven years after the signature and ratification of this convention. Opportunities of complaint were therefore never wanting. If intimated to me it would have been my duty to transmit at once any such intimation to our Government. Nor did I ever hear of complaints through their legation in Washington. It would have been natural to make objection when our misconstruction of the instrument was fresh, if we did misconstrue it. The occasion would have been especially opportune when I was subsequently engaged in extensive negotiations with England in 1823-24, which brought under consideration the whole relations, commercial and territorial, between the two countries, including our entire intercourse by sea and land with her North American colonies. Still, silence was never broken in the metropolitan atmosphere of London whilst I remained there.

"Your letter informs me that for more than twenty years after the convention there was no serious attempt to exclude us from those large

bays, and Mr. Everett, writing as Secretary of State, only on the 4th of December last, to Mr. Ingersoll, then our minister in London, renders more definite the time you would indicate, by saying that 'it was just a quarter of a century after the date of the convention before the first American fisherman was captured for fishing at large in Bay of Fundy.' I find it extremely difficult, under any lights at present before me, to explain the extraordinary circumstances which environ this international question consistently with the respect due to the high party on the other side; feelings the most friendly being ever due to her from the magnitude of the interests bound up in the subsistence of harmonious relations between the two countries."

The claim of Canada was pronounced a "new doctrine" by Mr. Bates, the umpire in the case of the "Washington" in 1853, who decided that the seizure of an American vessel while fishing in the Bay of Fundy was illegal, and this doctrine was again repudiated by the umpire in the case of the "Argus," seized for fishing on Saint Ann's Bank within headlands.

These cases are thus referred to in Wharton's International Law Digest, section 305a, vol. 3, page 59:—

"A construction of the terms 'coasts, bays, creeks, or harbors,' in the treaty of 1818, was given by the mixed commission under the convention of 1853, in the case of the United States fishing schooner 'Washington,' which was seized while fishing in the Bay of Fundy, ten miles from shore, taken to Yarmouth, Nova Scotia, and adjudged forfeited on the charge of violating the treaty of 1818 by fishing in waters in which the United States had, by that convention, renounced the right of its citizens to take fish. A claim of the owners of the 'Washington' for compensation came before the commission above mentioned, and the commissioners differing, the case was referred to Mr. Joshua Bates, the umpire, who, referring to the theory that 'bays and coasts' were to be defined by 'an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line, thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy,' pronounced it a 'new doctrine,' and, repudiating the decision of the provincial court based thereon, awarded the owners of the vessel compensation for

an illegal condemnation. The umpire also decided that as the Bay of Fundy is from sixty-five to seventy-five miles wide and from one hundred and thirty to one hundred and forty miles long, with several 'bays' on its coasts, and has one of its headlands in the United States, and must be traversed for a long distance by vessels bound to Passamaquoddy Bay, and contains one United States island, Little Menan, on the line between headlands, the Bay of Fundy could not be considered as an exclusively British bay. (See President's message communicating proceedings of commission to Senate; also Dana's Wheaton, section 274, note 142.) The 'headland' theory was again rejected by the umpire in the case of the schooner 'Argus,' which was seized while fishing on Saint Ann's Bank, twenty-eight miles from Cape Smoke, the nearest land, taken to Sydney, and sold for violation of the treaty of 1818 by fishing within headlands. The owners were awarded full compensation.

"Mr. Dana, in this connection, quotes (Dana's Wheat, sec. 274, note, 142) from the treaty between Great Britain and France of 1839 the following provisions: 'It is agreed that the distance of three miles, fixed as the general limit of the exclusive right of fishing upon the coasts of the two countries, shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

"As to the British concession that the Bay of Fundy is an open sea, see papers connected with message of President Fillmore, February 28th, 1853, with Senate Confid. Doc. No. 4, special session 1853, and see particularly Mr. Everett, Sec. of State, to Mr. Ingersoll, Dec. 4th, 1852, MSS. Inst. Gr. Brit., appended to message aforesaid.

"As to detention of fishermen in the Bay of Fundy, see President Monroe's message of Feb. 26th, 1825, House Doc. No. 408, 18th Cong., second sess., 5 Am. St. Pap. (For Rel.), 735.

"Mr. Rush's notes of negotiation, Monroe papers, Dept. of State."

The British Government has not supported the Canadian authorities in their claim, and practically yielded the claim in

favor of the United States. No better account of the course of the British Government on this question can be given than that by Mr. Phelps, in his letter of June 2d, 1886, to Lord Rosebury, of June 2d, 1886. Senate Ex. Doc. No. 113, 50th Congress, first sess., p. 413.

"On the 26th of May, 1870, Mr. Thornton, the British minister at Washington, communicated officially to the Secretary of State of the United States copies of the orders addressed by the British Admiralty to Admiral Wellesley commanding Her Majesty's naval forces on the North American station, and of a letter from the colonial department to the Foreign Office, in order that the secretary might 'see the nature of the instructions to be given to Her Majesty's and the Canadian officers employed in maintaining order at the fisheries in the neighborhood of the coasts of Canada.' Among the documents thus transmitted is a letter from the Foreign Office to the Secretary of the Admiralty, in which the following language is contained:—

"The Canadian Government has recently determined, with the concurrence of Her Majesty's minister, to increase the stringency of the existing practice of dispensing with the warnings hitherto given and seizing at once any vessel detected in violating the law.

"In view of this change and of the questions to which it may give rise, I am directed by Lord Granville to request that you will move their lordships to instruct the officers of Her Majesty's ships employed in the protection of the fisheries that they are not to seize any vessel unless it is evident and can be clearly proved that the offense of fishing has been committed and the vessel itself captured within three miles of land."

In the letter from the lords of the Admiralty to Vice-Admiral Wellesley of May 5th, 1870, in accordance with the foregoing request, and transmitting the letter above quoted from, there occurs the following language:—

"My lords desire me to remind you of the extreme importance of commanding officers of the ships selected to protect the fisheries exercising the utmost discretion in carrying out their instructions, paying special attention to Lord Granville's observation that no vessel should be seized unless it is evident and can be clearly proved that the offense of fishing has been committed and that the vessel is captured within three miles of land."

Lord Granville, in transmitting to Sir John Young these instructions, makes use of the following language:—

"Her Majesty's Government do not doubt that your ministers will agree with them as to the propriety of these instructions, and will give corresponding instructions to the vessels employed by them."

These instructions were again officially stated by the British minister at Washington to the Secretary of State of the United States in a letter dated June 11th, 1870.

Again, in February, 1871, Lord Kimberly, Colonial Secretary, wrote to the Governor-General of Canada as follows:—

“The exclusion of American fishermen from resorting to Canadian ports, except for the purpose of shelter and of repairing damages therein, purchasing wood, and of obtaining water, might be warranted by the letter of the Treaty of 1818 and by the terms of the imperial act 59 George III., chapter 38, but Her Majesty's Government feel bound to state that it seems to them an extreme measure, inconsistent with the general policy of the empire, and they are disposed to concede this point to the United States Government under such restrictions as may be necessary to prevent smuggling, and to guard against any substantial invasion of the exclusive rights of fishing which may be reserved to British subjects.”

During Sir Charles Tupper's speech in the House of Commons of Canada, April 10th, 1888, the following colloquy took place regarding the position taken by the British Government:—

“SIR CHARLES TUPPER.—Here is a dispatch from Downing street, dated 6th June, 1870:—

“‘Her Majesty's Government are fully aware that no step should be taken which should prejudice the question.’

“I want to draw the attention of the House to the fact that this was not a settled or concluded question—that it was not a question upon which the Governments of Great Britain and the United States had agreed or on which they had arrived at a common interpretation; and I want to draw my honorable friend's attention to the doubt that Her Majesty's Government had upon the subject. What do they say?

“‘Her Majesty's Government are fully aware that no steps should be taken which would prejudice the question—what are Canadian waters? Or should admit the right of the United States fishermen to fish within those waters except within the limits prescribed by the Convention of 1818.’

“‘But they do not abandon the hope that the question of abstract right may yet be avoided by some arrangement between Canada and the United States, or that the limits may be definitely settled by arbitration or otherwise; and while any expectation of this kind exists, they desire to avoid all occasions of dispute, so far as this is possible, consistently with the substantial protection of the Canadian fisheries. With those objects, they think it advisable that United States fishermen should not be excluded from any waters except within three miles from the shore, or in the unusual case of a bay which is less than six miles wide

at its mouth but spreads to a greater width within. It will, of course, be understood and explained to the United States Government that this liberty is conceded temporarily and without prejudice to the right of Great Britain to fall back on her treaty rights, if the prospect of an arrangement lessens, or if the concession is found to interfere practically with the protection of the Canadian fisheries.'

"That was also a dispatch from Lord Granville, June 6th, 1870. Now, under the pressure of this, as my honorable friend has stated, he changed his instructions in reference to the ten miles, and put in six miles, and forbade his officers to interfere with the American fishermen, not as in the first instructions he gave, if they were within three miles of the mouth of the bay, but only if they were within three miles of the shore, and he says:—

"Until further instructed, therefore, you will not interfere with any American fishermen unless found within three miles of the shore or within three miles of a line drawn across the mouth of a bay or creek, which, though in parts more than six miles wide, is less than six geographical miles in width at its mouth. In the case of any other bay, as Baie des Chaleurs, for example * * *

"The very bay he excluded them from was more than ten miles wide.

"— you will not interfere with any United States fishing vessel or boat or any American fishermen, unless they are found within three miles of the shore.'

"MR. MITCHELL.—Under positive instructions from England, against my representations and everything else.

"SIR CHARLES TUPPER.—I think I have satisfied my honorable friend that as far as Her Majesty's Government were concerned, while they maintained the abstract right under the treaty, they were unwilling to raise the question of bays, and the result is, as my honorable friend knows, that for the last thirty-four years, certainly since 1854—and I will not go further back than 1854—there has been no practical interference with American fishing vessels unless they were within three miles of the shore, in bays or elsewhere."

When it is remembered that our treaty relations are with the British Government and not with Canada, that the responsibility of determining what is the true construction of a treaty made by Her Majesty with any foreign power must remain with Her Majesty's Government, that Canada's claim to construe a treaty negotiated with the United States is admitted neither by the United States nor by Great Britain, it must be conceded that the course of the British Government in regard to the headland theory shows in itself that the claim of Canada has no substantial foundation.

It is evident, therefore, that the headland doctrine asserted

by Canada was an after-thought, repudiated both times that the question came before an umpire competent to pass upon it, that the British Government has declined to enforce it, and would yield the question in our favor if our position was maintained with firmness. In all justice and fairness, however, the United States can and should maintain before the world its fishery rights in the bays of Canada more than six miles in width.

With no better claim on the part of Canada our fishing vessels have been denied their commercial privileges under the concurrent action of the two countries in 1830, and denied the right to transport their catch under the twenty-ninth clause of the Treaty of 1871.

In 1870, more than fifty years after the Treaty of 1818, and forty years after all the restrictions on the commercial intercourse between the United States and British North America were abolished, Canada for the first time set up the claim that the American vessels had no right to buy bait in any of the bays or harbors of Canada. Previous to 1870, and during the period from 1877 to 1886, our fishing vessels continued to buy bait in Canadian ports without interference.

The Halifax Commission in 1877 decided that buying bait was a commercial privilege, and declined to award damages in favor of Canada, on the ground that it was not an incident of the treaty of 1871.

"Judicial authority," says Mr. Phelps in his letter of June 2d, 1886, to Lord Rosebery, upon this question, "is to the same effect. That the purchase of bait by American fishermen in the provincial ports has been a common practice and is well known. But in no case, so far as I can ascertain, has a seizure of an American vessel ever been enforced on the ground of the purchase of bait, or of any other supplies. On the hearing before the Halifax Commission in 1877, this question was discussed and no case could be produced of any such condemnation. Vessels shown to have been condemned were in all cases adjudged guilty, either of fishing or preparing to fish within the prohibited limit. And in the case of the "White Fawn," tried in the Admiralty Court of New Brunswick, before Judge Hazen, in 1870, I understand it to have been distinctly held that the purchase of bait, unless proved to have been in the preparation for illegal fishing, was not a violation of the treaty, nor of any existing law, and afforded no ground for proceeding against the vessel."

Judge Hazen, in the "White Fawn" case, said :—

"Assuming that the fact that such purchase establishes a preparing to fish, which I do not admit, I think before a forfeiture can be incurred it must be shown that the preparations were for an illegal fishing in British waters."

The first libel against any American fishing vessel for buying bait in port was in 1870. The construction by the Halifax Commission that the buying of bait is a commercial privilege was in 1877, and from 1877 to 1886 American fishing vessels bought bait in Canadian ports without interference. In 1886 the Canadians seized the schooner "David J. Adams" for purchasing bait in Annapolis Basin, Nova Scotia, and sent her to St. John, N. B., for trial. It was "not pretended that the vessel had been engaged in fishing or was intending to fish in the prohibited waters, or that it had done or was intending to do any other injurious act."

Mr. Bayard, in his letter of May 10th, 1886, to Sir Lionel West, referring to this case, said :—

"I ask you to consider the results of excluding American vessels duly possessed of permits from their own government to touch and trade at Canadian ports, as well as to engage in deep-sea fishing, from exercising freely the same customary and reasonable rights and privileges of trade in the ports of the British colonies as are freely allowed to British vessels in all the ports of the United States under the laws and regulations to which I have adverted."

"Among these customary rights and privileges may be enumerated the purchase of ship supplies of every nature, making repairs, the shipment of crews in whole or in part, and the purchase of ice and bait for use in deep-sea fishing. Concurrently these usual rational and convenient privileges are freely extended to and are fully enjoyed by the Canadian merchant marine of all occupations, including fishermen, in the ports of the United States. The question therefore arises whether such a construction is admissible as would convert the Treaty of 1818 from being an instrumentality for the protection of the in-shore fisheries along the described parts of the British-American coast into a pretext or means of obstructing the business of deep-sea fishing by citizens of the United States, and of interrupting and destroying the commercial intercourse that since the Treaty of 1818, and independent of any treaty whatever, has grown up and now exists under the concurrent and friendly laws and mercantile regulations of the respective countries.

"I may recall to your attention the fact that a proposition to exclude the vessels of the United States engaged in fishing from carrying also

merchandise was made by the British negotiators, and was abandoned. This fact would seem clearly to indicate that the business of fishing did not then and does not now disqualify a vessel from also trading in the regular ports of entry."

Thus in violation of treaty and other obligations, and while Canadian fishing vessels have been permitted in our ports without interference to purchase bait and supplies, Canada has denied the right to American fishing vessels to purchase bait and supplies.

The right of fishing vessels, under the Treaty of 1818, to enter Canadian bays and harbors for "wood and water," which plainly means, as these words were used in 1818, fuel and water, has been taken away by denying them the right to purchase coal, the fuel of fishing vessels of the present day.

While Canada, under the twenty-ninth clause of the Treaty of 1871, has been making shipments in bond to and from Canada through the United States, estimated by President Cleveland, in his message of August 23d, 1888, to Congress, to have amounted in value for the past six years to about \$270,000,000, the fishing vessels of the United States have not been allowed to ship, under the same treaty provision, their catch through Canada to the United States from Canadian ports.

Where pretexts for depriving American vessels of their fishing and commercial privileges under strained constructions were not afforded, Canada has endeavored so to harass and annoy American vessels in the exercise of their admitted treaty right to enter bays and harbors for the purposes of shelter and repairing damages, and of obtaining wood and water, as to make these rights worthless.

An examination of the list of American vessels seized, detained, or warned off from Canadian ports in the years 1886 and 1887 accompanying the Senate Document 113, of the first session of the Fiftieth Congress, shows that the "Helen F. Tredick" was refused shelter and water; the "John W. Bray" was refused shelter and supplies; the "Caroline Vought" and "Christina Ellsworth" refused wood and water; the "Novelty" was refused coal and water; the

"Stowell Sherman," "Walter L. Rich," "Newell B. Hawes," "Nellie M. Snow," "Gertrude Summers," "Charles R. Washington," "John M. Ball," "John Nye," "Asa H. Perrere," "Nathan Cleaves," "Frank G. Rich," "Emma O. Curtes," "Charles F. Atwood," "Gertie May," "Abbie M. Deering," "Cora Louis," "Eben Dale," "Charles Haskell," "Willie Parkham," "Eddie Davidson," "Cynosure," "Lottie E. Hopkins," "Andrew Burnham," "Harry G. French," "Col. J. H. French," "W. H. Wellington," "Ralph Hodgdon," "Hattie Evelyn," "Emma W. Brown," "Mary H. Thomas," "Hattie B. West," "Ethel Maud," were refused food or provisions or supplies; the "Mary E. Whorf" was not permitted to make repairs; and the "Sarah B. Putnam" and "Alice P. Higgins" were driven from port in storms.

The "Mollie Adams" was driven off into a storm without sufficient food, after entering the harbor of Mal Peque to land and after she had safely landed a crew of seventeen shipwrecked British sailors she had gone out of her way to rescue and whom she had fed for three days. The captain of the Canadian cruiser "Critic," fully informed of the humane action of the Mollie Adams and her needs, refused assistance, and threatened to seize her if she landed any of the wrecked material on board.

There are other cases reported where vessels seeking shelter were driven to sea before the storm had abated, but the cases referred to sufficiently show the flagrant violations by Canada of treaty and all other obligations in a spirit of barbarism and viciousness unworthy of a civilized nation.

Without commenting upon the action of Captain Quigley of the Canadian cutter "Terror" in lowering the flag of the United States fishing schooner "Marion Grimes," or upon the constant and arrogant stopping and boarding of American fishing vessels, of which over two thousand cases were reported in two years, it cannot be said that the language of Hon. Daniel Manning, in his letter as Secretary of the Treasury, of February 5th, 1887, to the chairman of the House Committee of Foreign Affairs, is either unjust or too severe where he refers to "the inhumanity and brutality with which certain

Canadian officials treated defenseless American fishermen during the last summer, even those who had gone out of their way to rescue Canadian sailors, and having entered a Canadian bay to safely land those they had saved attempted to procure food to sustain their own lives."

The acts to which the Canadians have been driven by adopting a strained construction of our treaty rights are as absurd as they are barbarous and inhuman. Mr. Phelps, in his letter of June 2d, 1886, to Lord Rosebery, said:—

"Such a literal construction is best refuted by considering its preposterous consequences. If a vessel enters a port to post a letter, or send a telegram, or buy a newspaper, to obtain a physician, or even to lend assistance to the inhabitants in fire, flood, or pestilence, it would, upon this construction, be held to violate the treaty stipulations maintained between two enlightened maritime and friendly nations whose ports are freely open to each other in all places and under all other circumstances."

He might have added:—

"Good faith clings to the *spirit*, and fraud to the *letter* of the convention."

Phillimore's Int. Law, vol. ii., page 97.

Yet John S. D. Thompson, the Canadian *Minister of Justice*, gravely wrote to Lord Lansdowne, on July 22d, 1886.

"That which Mr. Phelps calls literal interpretation is by no means so preposterous as he suggests when the purpose and object of the treaty come to be considered. It was necessary to keep out foreign fishing vessels, *excepting in cases of dire necessity*, no matter under what pretext they might desire to come in. The fisheries could not be preserved to our people if every one of the United States fishing vessels that are accustomed to swarm along our coasts could claim the right to enter our harbors 'to post a letter or send a telegram, or buy a newspaper; to obtain a physician in case of illness, or a surgeon in case of accident; to land or bring off a passenger, or even to lend assistance to the inhabitants in fire, flood, or pestilence,' or to 'buy medicine' or to 'purchase a new rope.' The slightest acquaintance with the negotiations which led to the Treaty of 1818 induces the belief that if the United States negotiators had suggested these as purposes for which their vessels should be allowed to enter our waters, the proposal would have been rejected as 'preposterous.'"

Previous to this time Mr. Bayard's public and official expressions in relation to the cases brought under his official

notice indicated an intention to insist upon the full and uninterrupted enjoyment of our fishing and commercial rights in Canadian waters and ports.

In his letter to Sir Lionel West on May 29th, 1886, referring to a bill authorizing the forcible search, seizure, and forfeiture of any foreign vessel found within any harbor in Canada, or hovering within three marine miles of the coasts, bays, or creeks of Canada, where such vessel has entered such waters for any purpose not provided for by the laws of Canada, the laws of Nations, or any treaty or convention then in force, Mr. Bayard, said:—

"Such proceedings I conceive to be flagrantly violative of the reciprocal commercial privileges to which citizens of the United States are lawfully entitled under the statutes of Great Britain and the well defined and publicly proclaimed authority of both countries, besides being, in respect of the existing conventions between the two countries, an assumption of jurisdiction entirely unwarranted and which is wholly denied by the United States."

Later Mr. Bayard said:—

On June 7th, 1886: "I earnestly protest against this unwarranted withholding of lawful commercial privileges from an American vessel and her owners, and for the loss and damage consequent thereon the government of Great Britain will be held liable."

On July 10th, 1886: "Against this treatment I make instant and formal protest as an unwarranted interpretation and application of the treaty by the officers of the Dominion of Canada and the province of Nova Scotia, as an infraction of the laws of commercial and maritime intercourse existing between the two countries and as a violation of hospitality, and for any loss or injury resulting therefrom the government of Her Britannic Majesty will be held liable."

On July 30th, 1886: "These are flagrant violations of treaty rights of their citizens for which the United States expect prompt remedial action by Her Majesty's government, and I have to ask that such instructions may be issued forthwith to the provincial officials of Newfoundland and of the Magdalen Islands as will cause the treaty rights of citizens of the United States to be duly respected. For the losses occasioned in the two cases I have mentioned, compensation will hereafter be expected from Her Majesty's Government when the amount shall have been accurately ascertained."

On August 9th, 1886: "The hospitality which all civilized nations prescribe has thus been violated and the stipulations of a treaty grossly infringed."

On August 18th, 1886: "The firing of a gun across their bows was a most unusual and wholly uncalled for exhibition of hostility, and equally

so was the placing of armed men on board the lawful and peaceful craft of a friendly nation."

On September 23d, 1886: "An illustration of the vexatious spirit in which the officers of the dominion of Canada appear to seek to penalize and oppress those fishing vessels of the United States lawfully engaged in fishing which from any cause are brought within their reach."

On November 6th, 1886: "If the unfriendly and unjust system of which these cases now presented are a part, is sustained by Her Majesty's Government, serious results will almost necessarily ensue, great as the desire of this Government is to maintain the relations of good neighborhood."

These being the rights of the United States in the North Atlantic fisheries, and these the claims and pretexts set up by Canada, and this the resolute position taken by the present Administration in the year 1886, and previous thereto, with regard to the unwarranted seizures and annoyances to our fishing vessels, it would naturally be assumed that no treaty attempting to settle the differences concerning our fishery rights would subsequently be proposed or assented to by the same Administration that did not restrict the headland theory of Canada to bays of width less than six miles, that did not confirm the right of our fishing vessels to buy bait and supplies and exercise other ordinary commercial rights in Canadian ports, and to transship their catch under the provisions of the Treaty of 1871, and that did not fully provide indemnity for the vessels illegally seized or deprived of treaty rights.

The Chamberlain-Bayard Treaty.

WHEREAS differences have arisen concerning the interpretation of Article I. of the Convention of October 20th, 1818, the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, being mutually desirous of removing all causes of misunderstanding in relation thereto, and of promoting friendly intercourse and good neighborhood between the United States and the Possessions of Her Majesty in North America, have resolved to conclude a Treaty to that end, and have named as their Plenipotentiaries, that is to say:—

The President of the United States; Thomas F. Bayard,

Secretary of State; William L. Putnam, of Maine; and James B. Angell, of Michigan;

And Her Majesty the Queen of the United Kingdom of Great Britain and Ireland; the Right Honorable Joseph Chamberlain, M. P.; the Honorable Sir Lionel Sackville West, K. C. M. G.; Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America; and Sir Charles Tupper, G. C. M. G., C. B., Minister of Finance of the Dominion of Canada;

Who, having communicated to each other their respective Full Powers, found in good and due form, have agreed upon the following articles:—

ARTICLE I.

The High Contracting Parties agree to appoint a mixed Commission to delimit, in the manner provided in this Treaty, the British waters, bays, creeks, and harbors of the coasts of Canada and of Newfoundland, as to which the United States, by Article I. of the Convention of October 20th, 1818, between the United States and Great Britain, renounced forever any liberty to take, dry, or cure fish.

ARTICLE II.

The Commission shall consist of two commissioners to be named by Her Britannic Majesty, and of two commissioners to be named by the President of the United States, without delay, after the exchange of ratifications of this Treaty.

The Commission shall meet and complete the delimitation as soon as possible thereafter.

In case of the death, absence, or incapacity of any commissioner, or in the event of any commissioner omitting or ceasing to act as such, the President of the United States or Her Britannic Majesty respectively shall forthwith name another person to act as commissioner instead of the commissioner originally named.

ARTICLE III.

The delimitation referred to in Article I. of this Treaty shall be marked upon British Admiralty charts by a series of

lines regularly numbered and duly described. The charts so marked shall, on the termination of the work of the Commission, be signed by the commissioners in quadruplicate, one copy whereof shall be delivered to the Secretary of State of the United States, and three copies to Her Majesty's Government. The delimitation shall be made in the following manner, and shall be accepted by both the High Contracting Parties as applicable for all purposes under Article I. of the Convention of October 20th, 1818, between the United States and Great Britain.

The three marine miles mentioned in Article I. of the Convention of October 20th, 1818, shall be measured seaward from low-water mark; but at every bay, creek, or harbor not otherwise specially provided for in this Treaty such three marine miles shall be measured seaward from a straight line drawn across the bay, creek, or harbor in the part nearest the entrance at the first point where the width does not exceed ten marine miles.

ARTICLE IV.

At or near the following bays the limits of exclusion under Article I. of the Convention of October 20th, 1818, at points more than three marine miles from low-water mark shall be established by the following lines, namely:—

At the Baie des Chaleurs the line from the Light at Birch Point on Miscou Island to Macquereau Point Light; at the Bay of Miramichi, the line from the Light at Point Escuminac to the Light on the Eastern Point of Tabisintac Gully; at Egmont Bay, in Prince Edward Island, the line from the Light at Cap Egmont to the Light at West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from Cape Sable to the Light at Point Aconi.

At St. John's Bay, in Newfoundland, the line from Connaigre Head to the Light on the south-easterly end of Brunet Island, thence to Fortune Head; at Sir Charles Hamilton Sound, the line from the south-east point of Cape Fogo to White Island, thence to the north end of Peckford Island, and from the south end of Peckford Island to the East Headland of Ragged Harbor.

At or near the following bays the limits of exclusion shall be three marine miles seaward from the following lines, namely :—

At or near Barrington Bay, in Nova Scotia, the line from the Light on Stoddard Island to the Light on the south point of Cape Sable, thence to the Light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island Light to Green Island Light, thence to Point Rouge; at Mira Bay, the line from the Light on the east point of Scatari Island to the north-easterly point of Cape Morien; and at Placentia Bay, in Newfoundland, the line from Latine Point, on the eastern mainland shore, to the most southerly point of Red Island, thence by the most southerly point of Merasheen Island to the mainland.

Long Island and Bryer Island, at St. Mary's Bay in Nova Scotia, shall, for the purpose of delimitation, be taken as the coasts of such bay.

ARTICLE V.

Nothing in this Treaty shall be construed to include within the common waters any such interior portions of any bays, creeks, or harbors as cannot be reached from the sea without passing within the three marine miles mentioned in Article I. of the Convention of October 20th, 1818.

ARTICLE VI.

The commissioners shall from time to time report to each of the High Contracting Parties, such lines as they may have agreed upon, numbered, described, and marked as herein provided, with quadruplicate charts thereof; which lines so reported shall forthwith from time to time be simultaneously proclaimed by the High Contracting Parties, and be binding after two months from such proclamation.

ARTICLE VII.

Any disagreement of the commissioners shall forthwith be referred to an umpire selected by the Secretary of State of the United States and Her Britannic Majesty's Minister at Washington; and his decision shall be final.

ARTICLE VIII.

Each of the High Contracting Parties shall pay its own commissioners and officers. All other expenses jointly incurred in connection with the performance of the work, including compensation to the umpire, shall be paid by the High Contracting Parties in equal moieties.

ARTICLE IX.

Nothing in this treaty shall interrupt or affect the free navigation of the Strait of Canso by fishing vessels of the United States.

ARTICLE X.

United States fishing vessels entering the bays or harbors referred to in Article I. of this Treaty shall conform to harbor regulations common to them and to fishing vessels of Canada or of Newfoundland.

They need not report, enter, or clear, when putting into such bays or harbors for shelter or repairing damages, nor when putting into the same, outside the limits of established ports of entry, for the purpose of purchasing wood or of obtaining water; except that any such vessel remaining more than twenty-four hours, exclusive of Sundays and legal holidays, within any such port, or communicating with the shore therein, may be required to report, enter, or clear; and no vessel shall be excused hereby from giving due information to boarding officers.

They shall not be liable in any such bays or harbors for compulsory pilotage; nor, when therein for the purpose of shelter, of repairing damages, of purchasing wood, or of obtaining water, shall they be liable for harbor dues, tonnage dues, buoy dues, light dues, or other similar dues; but this enumeration shall not permit other charges inconsistent with the enjoyment of the liberties reserved or secured by the Convention of October 20th, 1818.

ARTICLE XI.

United States fishing vessels entering the ports, bays, and harbors of the Eastern and Northeastern coasts of Canada or

of the coasts of Newfoundland under stress of weather or other casualty may unload, reload, transship, or sell, subject to customs laws and regulations, all fish on board, when such unloading, transshipment, or sale is made necessary as incidental to repairs, and may replenish outfits, provisions, and supplies damaged or lost by disaster; and in case of death or sickness shall be allowed all needful facilities, including the shipping of crews.

Licenses to purchase in established ports of entry of the aforesaid coasts of Canada or of Newfoundland, for the homeward voyage, such provisions and supplies as are ordinarily sold to trading vessels, shall be granted to United States fishing vessels in such ports, promptly upon application and without charge; and such vessels having obtained licenses in the manner aforesaid, shall also be accorded upon all occasions such facilities for the purchase of casual or needful provisions and supplies as are ordinarily granted to the trading vessels; but such provisions or supplies shall not be obtained by barter, nor purchased for re-sale or traffic.

ARTICLE XII.

Fishing vessels of Canada and Newfoundland shall have on the Atlantic coast of the United States all the privileges reserved and secured by this treaty to United States fishing vessels in the aforesaid waters of Canada and Newfoundland.

ARTICLE XIII.

The Secretary of the Treasury of the United States shall make regulations providing for the conspicuous exhibition by every United States fishing vessel, of its official number on each bow; and any such vessel, required by law to have an official number, and failing to comply with such regulations, shall not be entitled to the licenses provided for in this Treaty.

Such regulations shall be communicated to Her Majesty's Government previously to their taking effect.

ARTICLE XIV.

The penalties for unlawfully fishing in the waters, bays, creeks, and harbors referred to in Article I. of this Treaty, may extend to forfeiture of the boat or vessel and appurtenances, and also of the supplies and cargo aboard when the offense was committed; and for preparing in such waters to unlawfully fish therein, penalties shall be fixed by the court, not to exceed those for unlawfully fishing; and for any other violation of the laws of Great Britain, Canada, or Newfoundland, relating to the right of fishery in such waters, bays, creeks, or harbors, penalties shall be fixed by the court, not exceeding in all three dollars for every ton of the boat or vessel concerned. The boat or vessel may be holden for such penalties and forfeitures.

The proceedings shall be summary and as inexpensive as practicable. The trial (except on appeal) shall be at the place of detention, unless the judge shall, on request of the defense, order it to be held at some other place adjudged by him more convenient. Security for costs shall not be required of the defense, except when bail is offered. Reasonable bail shall be accepted. There shall be proper appeals available to the defense only; and the evidence at the trial may be used on appeal.

Judgments of forfeiture shall be reviewed by the Governor-General of Canada in Council, or the Governor in Council of Newfoundland, before the same are executed.

ARTICLE XV.

Whenever the United States shall remove the duty from fish-oil, whale-oil, seal-oil, and fish of all kinds (except fish preserved in oil), being the produce of fisheries carried on by the fishermen of Canada and Newfoundland, including Labrador, as well as from the usual and necessary casks, barrels, kegs, cans, and other usual and necessary coverings containing the products above mentioned, the like products, being the produce of fisheries carried on by the fishermen of the United States, as well as the usual and necessary coverings of

the same, as above described, shall be admitted free of duty into the Dominion of Canada and Newfoundland.

And upon such removal of duties, and while the aforesaid articles are allowed to be brought into the United States by British subjects, without duty being reimposed thereon, the privilege of entering the ports, bays, and harbors of the aforesaid coasts of Canada and Newfoundland shall be accorded to United States fishing vessels by annual licenses, free of charge, for the following purposes, namely:—

1. The purchase of provisions, bait, ice, seines, lines, and all other supplies and outfits.
2. Transshipment of catch, for transport by any means of conveyance.
3. Shipping of crews.

Supplies shall not be obtained by barter, but bait may be so obtained.

The like privileges shall be continued or given to fishing vessels of Canada and of Newfoundland on the Atlantic coasts of the United States.

ARTICLE XVI.

This Treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate, and by Her Britannic Majesty, having received the assent of the Parliament of Canada and of the Legislature of Newfoundland, and the ratifications shall be exchanged at Washington as soon as possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this Treaty, and have hereunto affixed our seals.

Done in duplicate, at Washington, this fifteenth day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

(Signed)	T. F. BAYARD,	[SEAL]
"	WILLIAM L. PUTNAM,	[SEAL]
"	JAMES B. ANGELL,	[SEAL]
"	J. CHAMBERLAIN,	[SEAL]
"	L. S. SACKVILLE WEST,	[SEAL]
"	CHARLES TUPPER.	[SEAL]

A General Review of the Chamberlain-Bayard Treaty.

The spirit that pervades the Treaty of 1783 is that of the Continental Congress, which by its resolution of May 27th, 1779, declared "That in no case by any treaty of peace the common right of fishing be given up."

John Adams, in his letter of May 30th, 1814, to Richard Rush, said "that the men Bayard, Russell, Clay, and even Gallatin, would cede the fee simple of the United States as soon as they would the fisheries."

We recall that Benjamin Rush, in his letter to Secretary Marcy in 1853, says that "Had Mr. Gallatin been told by the British plenipotentiaries that the first article of the convention would close the extensive waters of that bay (referring to the Bay of Fundy) against our fishermen, I do not believe he would have signed it. I am sure I would not have signed it. The spirit, context, all the concomitants of the article, pointed to a different meaning."

Certainly the spirit of the treaty of 1818, and of the American commissioners of that treaty, was not to abandon our ancient fishery rights.

If that same spirit pervaded the commissioners on the part of the United States in the proposed treaty of 1888, it is unfortunate that there is nothing in the treaty, or in what we have been able to learn of its negotiation, to show it. On the contrary the fundamental principles of property and sovereignty, which are the basis of our fishery rights, seem to have been abandoned at the outset by our own commissioners and our case to have been presented and considered, as Mr. Bayard expresses it in his letter to a gentleman in Boston, on the basis of the "fishery rights of one country in the jurisdictional waters of another."

"There was one subject," Sir Charles Tupper stated in his speech in the House of Commons of Canada, "on which I was glad to find that the American plenipotentiaries and myself were entirely as one. They expressed no wish to acquire the right to fish in the jurisdiction waters of Canada.

With that expression of opinion on their part I heartily concurred."

This certainly was not treating our fishery rights as "our fisheries," to use the words of Mr. Jefferson, but as "theirs," and it is therefore not surprising to find the results of the negotiation in a treaty which absolutely abandons the principles and positions for which the United States "had so long and so strenuously contended."

The discussions of the commissioners during the negotiation have not been made public by our commissioners. They have not disclosed what occurred, and we are indebted for all that we have learned with regard to the negotiations to the speech of Sir Charles Tupper in support of the treaty. He declared his surprise that they were not disclosed. "I have explained to the house," he said, "*my great surprise at finding that they did not give what I assumed that the purely formal protocols to which I assented would give*, that is to say, all the proposals made, and the counter proposals, and the replies on both sides. I assumed that the protocols would contain those."

The British commissioners therefore expected them to be published, but our commissioners have declined to disclose them. While the British commissioners not only did not object to, but expected, the details concerning the negotiations to be made public, when the Senate asked for the papers and information concerning the progress of the negotiations the President declined to furnish them. We are left necessarily to Mr. Tupper to explain the reasons for many of the provisions of the treaty.

The headland theory of Canada—the "new doctrine" which the British Government itself declined to enforce, is admitted, and our fishing vessels are excluded from all bays ten miles wide at their mouth, and expressly from wider bays ranging from fifteen to twenty-one miles in width, such as the Bay of Chaleurs, the Bay of Miramichi, Egmont Bay, Offstannes Bay, Fortune Bay, Sir Charles Hamilton's Sound, and Barrington Bay; and, consequently, with the exception of the Bay of Fundy, and a few bays on the Newfoundland coast, every bay of value to our fishermen is closed by the treaty.

Thus the difference with Canada upon the headland theory was proposed to be settled, and by articles I., II., III., IV., V., VI., and VII. of the treaty the position of the United States was abandoned, and valuable rights, which would probably have been conceded at all events not earnestly disputed, were voluntarily surrendered.

Certainly the new American policy of concession shown at the outset of the negotiations, and described by Sir Charles Tupper, was fully maintained throughout. He says: "I think the very spirit and policy of this commission which was proposed, was to ascertain, to settle, and to remove these doubts, and I say, when we met these gentlemen and *they proposed to us this ten-mile limit*, and said: If you give up the extreme contention that no bay, however broad its mouth, can be entered by an American fisherman, *we will agree to take the ten-mile limit*, and when they met us further and said that, in addition to that they would take up and consider the question of any special bays we thought ought not to be open to foreigners, then we took this question up, as we were bound to take it up, and found a solution by mutual concession. Instead of giving in to their contention that they could go into the Baie des Chaleurs within three miles of the shore, we made a treaty by which they cannot enter the Baie des Chaleurs at all. And the honorable gentleman knows that the Miramichi Bay, and a number of other bays that we consider of vital importance to be kept free from any kind of intrusion, have been conceded to us."

Article XI. provides:—

"United States fishing vessels entering the ports, bays, and harbors of the eastern and north-eastern coasts of Canada or of the coasts of Newfoundland, under stress of weather or other casualty, may unload, reload, transship, or sell, subject to customs, laws, and regulations, all fish on board, when such unloading, transshipment, or sale is made necessary as incidental to repairs, and may replenish outfits, provisions, and supplies damaged or lost by disaster; and in case of death or sickness shall be allowed all needful facilities, including the shipping of crews."

Without a treaty provision these rights should be secure. Unless "in stress of weather or other casualty," when "necessary as incidental to repairs," or "in case of death or sickness," these privileges are not to be exercised. No civilized nation would require a vessel to point to a treaty provision to secure the ordinary rights of shelter.

But the effect of inserting this provision is that it is an admission on our part that without such a provision our fishing vessels would not have the right, and therefore they have not had the right in the past and they do not have the right now. This is confirmed by the expression of Sir Charles Tupper when he says, "Although this is a very considerable and important concession, and although we were not compelled in my judgment, under a strict literal interpretation of the treaty of 1818, to make it, yet it was a wise and judicious concession to make." Evidently our commissioners agreed with this view or they would not have assented to it.

A provision of this kind is a disgrace to any civilized nation; a provision less liberal than that accorded to us by articles IX. and X. of the treaty with Algiers in 1815, which provide as follows:—

"Vessels of either of the contracting parties putting into ports of the other, and having need of provisions or other supplies, shall be furnished at the market price; and if any such vessel should so put in from a disaster at sea, and have occasion to repair, she shall be at liberty to land and re-embark her cargo without paying any customs or duties whatever; but in no case shall she be compelled to land her cargo.

"Should a vessel of either of the contracting parties be cast on shore within the territories of the other, all proper assistance shall be given to her crew; no pillage shall be allowed; the property shall remain at the disposal of the owners; and if reshipped on board of any vessel for exportation no customs or duties whatever shall be required to be paid thereon, and the crew shall be protected and succored until they can be sent to their own country."

See Statutes at Large, vol. 8, page 224.

That the X. and the XI. provisions should be admitted by American commissioners as necessary amendments to the treaties negotiated by John Adams, Benjamin Franklin, John Jay, Henry Laurens, Albert Gallatin, and Richard Rush is enough to make them turn in their graves.

The Hon. William Henry Trescott, with some indignation says: "I refuse absolutely to discuss 'privileges' granted to us in distress. They are not the grants of treaties or arrangements. They are the common rights of humanity. If the English and Canadian authorities desire to refuse shelter to vessels in distress, to exclude a sick seaman from the rest and aid of a hospital (if any such there be on the Canadian-Newfoundland coast) or to compel a cargo of fish to be thrown overboard, because it shall neither be sold nor transhipped, let them do so. The common sense and resolution of the American people and the public opinion of the civilized world will correct such conduct sooner and surer than the creaky machinery of this diplomatic invention of our commissioners."

Notwithstanding Mr. Tupper thought this was a wise and judicious concession, yet it is evident from what he also says that Canada, no matter what her claim, would be required by every rule of humanity to grant this much to our fishermen, without the treaty provision.

"What would be thought of Canada," he says, "if an American, or a United States fishing vessel—I do not like to use the word American, because I think it is a term we have as much right to as our neighbors; I prefer to speak of them as the people of the United States, and ourselves as Canadians, and when I speak of the whole continent of America I do not hesitate to apply the term American to the people of both Canada and the United States—but what would be thought of Canada if a vessel of the United States, loaded with fresh mackerel or fish of any other description, were driven by stress of weather, and perhaps in a sinking condition, and compelled to resort to a Canadian port, and if, instead of allowing her to transship her cargo or sell it on paying the duty, and go upon a marine slip for repairs, we

said : No ; you must throw overboard the whole of your cargo, because we find you are not allowed to bring your fish into Canada ? ”

Article XII. provides : “ Fishing vessels of Canada and Newfoundland shall have, on the Atlantic coast of the United States, all the privileges reserved and secured by this treaty to United States fishing vessels in the aforesaid waters of Canada and Newfoundland.”

Under the Treaties of 1783 and 1818 the Canadians had no reciprocal rights of fishing on our coast. Under the reciprocity Treaty of 1854 they were given the right in a restricted degree, the provision being as follows :—

Article II. “ It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern sea coasts and shores of the United States north of the thirty-sixth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish ; provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

“ It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all fisheries in rivers and mouths of rivers are hereby reserved exclusively for fishermen of the United States.”

Under the Treaty of 1871 the right was renewed, but restricted to the sea coast north of the thirty-ninth parallel of north latitude.

Article XIX. “ It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the eastern sea coast and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea coasts and shores of the United States, and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the

purpose of drying their nets and curing their fish; provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

"It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all other fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States."

Both the Treaties of 1854 and 1871 were careful to provide that the right did not extend to shell-fish, that it applied only to sea fishery, and did not extend to salmon, shad, or fisheries in rivers or mouths of rivers.

No such restrictions are attached to the privileges given under the XII. provision, but on the contrary the fishing vessels of Canada and Newfoundland have on the Atlantic coast all the privileges reserved and secured by this Treaty to the United States fishing vessels in the aforesaid waters of Canada and Newfoundland.

The opinion of the Hon. Chas. Levi Woodbury upon this provision shows that—

"The effect of this article is more extensive than would appear on a cursory reading. What are the 'aforesaid waters,' and what 'the privileges reserved and secured by this treaty,' which we are required to reciprocate on our Atlantic coasts, and what is the measure of the reciprocity that this article calls for?

"In 'the aforesaid waters' we have the 'liberty' to fish for all kinds of fish near the shores, to land, cure, and dry the fish on a vast extent of the coasts of Canada and Newfoundland, but on a limited portion are excluded from fishing within three miles of the shore.

"This February convention refers and relates to both these classes of waters—see Article 11—"the ports, bays, and harbors of the eastern and north-eastern coasts of Canada or of the coasts of Newfoundland."

"Article 10. 'The bays and harbors of the renounced fishery district,' (Article 1) 'including certain interior portions.' (Article 5.) Thus the whole waters of the British North American seacoast are included as the field for finding all the privileges which the treaty grants to the British vessels on our coasts. 'All the privileges' must be gleaned from the treaties.

"This right to fish and land, to dry and cure, must be extended to them on all our Atlantic coasts. No reservation is made of any kind of fishing nor of any part of the coast, in or outside of the State lines, or of the three-mile line, or of private rights now vested. The treaty will become supreme over State conventions and laws.

"It follows that the Canadians and Newfoundlanders can participate, within three miles of the coast of the United States, in all the local fisheries, river, bay, and coast. The shad, herring, lobster, crab, snapper, terrapin, bass, baitfish, oyster, shrimp, clams, turtle, and sponge fisheries of the Southern coasts are all laid open to them as fully as the cod, hake, and haddock, lobster, &c., of the Eastern States.

"State laws are annulled and the entire existing private rights in bays and rivers now protected by laws are wiped out by this one article of the treaty. Delaware and Chesapeake bays, the sounds of North Carolina, South Carolina, Georgia, Florida, and their rivers, are all made free to the fishing of the Canadians and Newfoundlanders, in season or out of season, in any mode they please to employ.

"Aye, they may claim that the shores of the Gulf of Mexico are part of the Atlantic coasts, and Alabama, Mississippi, Louisiana, and Texas may be equally invaded.

"This is not an idle construction of Article 12. The treaty becomes part of Article 1 of the treaty of 1818 (see its preamble). It embraces a wider scope than the renunciation clause, and, as the interpretation of the treaty of 1818, its clauses become grafted and incorporated integrally as one substance with that treaty. There is no escape by saying that Articles 10, 11, and 12 are complete within themselves, for the last clause of Article 10 says 'but this enumeration shall not permit other charges inconsistent with the enjoyment of the liberties reserved and secured by the convention of October 20th, 1818.'

"Can it be denied this clause 'reserves and secures' those 'liberties' of 1818, and brings them within the descriptive words of Article 12, as 'privileges reserved and secured by this treaty' which are to be reciprocally enjoyed by the Canadians and Newfoundlanders on the Atlantic coast of the United States? The words "liberties" means privileges rather than 'rights' in all the diplomatic correspondence of the English. The United States reserves nothing in Article 12.

"I think there can be no reasonable doubt that Article 12 will justify a British claim to participate in all our coast, bay, sound, and river fisheries, and will preclude Congress or the States from passing any laws on the subject without British consent."

The catch of Canadian vessels on our coast are not imports from foreign ports and could therefore be brought into any of our ports free of duty.

Reply of Secretary of Treasury to Speaker of the House of Representatives, January 10th, 1887.

We have recognized the right which is now freely exercised by Canadian vessels in our ports to buy bait and supplies and transmit their catch to Canada.

And as Mr. Bayard has said : —

"No governments have been more earnest and resolute in insisting that vessels driven by stress of weather into foreign harbors should not be subject to port exactions than the Governments of Great Britain and the United States. * * * Acting in this spirit the Government of the United States has been zealous, not merely in opening its ports freely, without charges, to vessels seeking them in storm, but in insisting that its own vessels seeking foreign ports under such circumstances and exclusively for such shelter are not, under the laws of nations, subject to custom-house exactions; * * * while in cases of vessels driven by storm on inhospitable coasts both Governments have asserted it, sometimes by extreme measures of redress to secure indemnity for vessels suffering under such circumstances from port exactions or from injuries inflicted from shore."

The privilege therefore granted under the twelfth provision of fishing on our coast to Canadian fishermen would unquestionably be exercised by them free from the vexations and annoyances inflicted by them upon our fishermen.

No matter what may be the local laws of our States on the subject of fisheries, this article in the treaty would be the supreme law of the land.

" * * * *All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the Judges in every State shall be bound thereby anything in the Constitution or laws of any State to the contrary notwithstanding.*"

Constitution of the United States, Section 2, Article VI.

The stipulations of a treaty are paramount to the provisions of the Constitution of a particular State of the United States (Gordon's Lessee *vs.* Kerr, 1 Wash. C. C. R., 322), and the adoption of a treaty with stipulations of which the provisions of a State law are inconsistent is equivalent to a repeal of such law (Fisher's Lessee *vs.* Harnden, 1 Paine C. C. R., 58).

From our experience with Canada we can be satisfied that whatever possible claim could be asserted by her under this or any other provision of the proposed Treaty would be asserted whenever it appeared to be for her interest to do so.

As Canada is given the same privileges on our coast as are "reserved and secured" to us in the waters on the coast of Canada, it cannot be said that Canada would obtain little by this provision. If her privileges on our coast would be of little value then our fishery rights have been so whittled away as to be of little value. The value and extent of her rights on our coast must necessarily be the same under that provision as ours on her coast. Our rights under the treaties of 1783 and 1818 have been considered invaluable, as these rights are of the same character as those of Canada itself. Canada has been jealous of them and endeavored to restrict them. If they have been fully maintained by the proposed treaty and none of them abandoned, then it has been proposed by this provision to grant similar rights to her on our coast. If our rights have been maintained under the proposed treaty then her rights are great. Nothing could express more clearly than Article XII. the intention to give reciprocal privileges, and, measuring the treaty by this provision of it, nothing can better show that privileges have been granted to Canada which should not have been granted, or that rights have been surrendered which should have been maintained at all hazards.

Article XIV. provides that the penalties for unlawful fishing "may extend to forfeiture of the boat or vessel and appurtenances, and also of the supplies and cargo aboard when the offense was committed." Under the British Sea Fisheries Act of 1868 and 1883 this offense when committed in British waters by French vessels and those of other countries is punishable by fine only, and that not exceeding £10 for the first and £20 for the second offense.

Article XV. in effect says that our fishing vessels have not, and until the United States shall remove the duties upon the fish products of Canada and Newfoundland shall not have, the right to enter the bays and harbors of Canada and Newfoundland to purchase bait or supplies, transship their catch, or ship crews. We did not even retain what is allowed French fishermen under their Treaty of 1885—

"The French fishermen shall have the right to buy bait, herring, and caplin, on land or at sea, in the harbors of Newfoundland, without tax or

impediment of any kind, after the fifth day of April of each year, and until the end of the fishing season."

Art. XVII., Treaty between France and Great Britain,
Newfoundland Fisheries, Paris, Nov. 14, 1885.

Article IX. of the treaty provides that "nothing in this treaty shall interrupt or affect the free navigation of the Straits of Canso by fishing vessels of the United States."

In the spirit of a general denial and restriction of our rights Canada suggested in 1836 a question with regard to our right to navigate the Straits of Canso. While our fishermen do not fish or claim to fish in the strait the use of the strait is necessary to save a long, difficult, and at some seasons of the year a dangerous voyage around the Island of Cape Breton, in going to or coming from the Gulf of St. Lawrence where our right to fish is unquestioned. The safety and convenience of our vessels require the use of the strait, and its use by them harms no one.

Sabine's Report on the Fisheries, page 465.

"Straits are passages communicating from one sea to another. If the use of these seas is free, the communications ought to be equally free, for otherwise the liberty of these seas would be a chimera. It is not sufficient, therefore, in order that property in a strait may be attributed to a nation mistress of its shores to say that the strait is actually in the power of this nation, that it has the means of controlling the passage by its artillery or by any other mode of action or defense; in a word that it is able to have the waters really in its possession."

Vol. I, page 146, Ortolan, *Diplomatie de la Mer*.

"Straits are passages communicating from one sea to another. If the navigation of two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected."

Lawrence's Wheaton, *Int. Law*, page 328.

When it is remembered that our right to fish in the Gulf of St. Lawrence is admitted; that it is necessary to use this strait to reach the gulf; that Canada has never dared to seize

a fishing vessel of the United States on its way to or coming from the Gulf of St. Lawrence; that it would be a violation of a fundamental principle of international law and of comity to interfere with our vessels while so using the strait, it can hardly be conceived that Canada would insist upon her claim to close the strait to American vessels. The British Commissioners did not ever present this claim, but on the contrary they of their own motion inserted this provision.

Mr. Tupper, in explaining this article to the House of Commons, said:—

"I may explain to the house that that was not a surrender of British interests or Canadian interests at the dictation or at the request of the plenipotentiaries of the United States. *That clause was inserted in the treaty by ourselves*, and for this reason: That the rule for the delimitation which was adopted, the ten-mile rule, would have necessarily excluded, if we took in Chedabucto Bay, which we did take in by making the delimitation, as honorable gentlemen will see, not from one side of the main land of the bay to the other, which would have opened it to the United States, but from the island between; by that delimitation the United States would have been shut out altogether from passing through the Straits of Canso, because they could not have gone into Chedabucto Bay, and therefore they asked that Chedabucto Bay should be excluded from the delimitation, which made it an exclusive bay, in order to prevent their being shut out of the navigation of the Straits of Canso. Well, sir, under those circumstances we met that by providing nothing new. We provided simply that nothing in this treaty should interrupt the free navigation of the Straits of Canso, as previously enjoyed by fishing vessels, *to which we confined it*, and in that way we avoided making an exception of Chedabucto Bay, which is the entrance from the Atlantic side of the Straits of Canso."

Unfortunately this provision refers to "fishing vessels" only, so that if the treaty had been ratified Canada could and would have claimed that it recognized her right to close the strait to all American vessels, and that American fishing vessels only could navigate the strait.

The article inserted by the British Commissioners on their own motion is pointed out, however, as a great triumph by our Commissioners.

"The uninterrupted navigation of the Straits of Canso is expressly and for the first time confirmed," says President Cleveland.

Under some circumstances it would not be said that the IX. provision is one to be grateful for, but probably when the treaty as a whole is examined we can join President Cleveland in his congratulations that this much, at all events, has been retained for our fishing vessels.

We are told of the young physician who, having been called in at an event in a family, was asked by an anxious friend how the mother and child were doing, and of his enthusiastic reply, "Oh! the mother and child are dead, but the old man is safe." So while the treaty rights of 1783 and 1818 were surrendered under the proposed treaty, we have the enthusiastic declaration that our fishing vessels will still have the right to navigate the Straits of Canso.

Without commenting upon the provision that "every United States fishing vessel," without limiting its application to those engaged in fishing on the Canadian coast, shall have "its official number on each bow," or upon the words "wood and water" in the tenth clause (after the denial of Canada that the word "wood" in the Treaty of 1818 means fuel, and that consequently our vessels are forbidden to purchase coal for fuel), or upon the absence of any provision securing indemnity for our vessels deprived of treaty rights, driven out of port into storms, without food or supplies, or the inhumanity and brutality inflicted on our fishermen, we have a treaty based not upon our great and ancient fishing rights as evidenced by the Treaties of 1783 and 1818, but upon the theory that the Treaty of 1783 has no existence and that we are entitled only to the mere "fishing rights of one nation in the jurisdictional waters of another," not upon the theory of "our" fisheries but theirs, a treaty that absolutely surrenders principles which have at all hazards been strenuously contended for and maintained since the organization of our Government—a treaty that sells our birthright for a mess of pottage.

The question naturally recurs, Why this desire, why this anxiety to press the adoption of this treaty, when the Treaties of 1783 and 1818, if fairly complied with or enforced according to their terms, are sufficient for our purposes; when our experience with Canada in the past in performing treaty obligations has not been such as to assure us that any new treaty would receive from her any greater respect; when the Senate by a majority of 25 declared in 1886 that the appointment of commissioners to frame a new treaty was not advisable; and when the Executive has declined to furnish to the Senate the papers and information concerning the progress of the negotiations of the treaty, including the proposals and counterproposals made?

Altogether is there not reason for regret and for some apprehension that the Chief Executive of this country, notwithstanding the rejection of the proposed Treaty, should officially reassert "that its provisions were adequate for our security in the future from vexatious incidents, and for the promotion of friendly neighborhood and intimacy, without sacrificing in the least our national pride or dignity."

Certainly a change has come over the people of this country if we cannot say, as Lewis Cass said in the Senate in 1852 (vol. 25, App. Cong. Globe, page 895), in referring to our right to fish in the North Atlantic and the methods then adopted to harass and annoy our fishermen in the exercise of that right: "We mean to hold on to it through the whole extent of the great deep, now in the days of our strength, as our fathers held on to it in the days of our weakness. Should we abandon this attribute of independence, even in any extremity which human sagacity can foresee, we should prove recreant both to the glories of the past and to the hopes of the future, to the deeds of our fathers and to the just expectations of our children. I know but little of the character of my countrymen, if they would not reject with indignation any proposition thus to tarnish their history, and to write their own dishonor upon it."